Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE E. GARDNER,

Petitioner,

v.

UNITED STATES OF AMERICA, et al

Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Bruce E. Gardner, Esq
Petitioner Pro Se
The Gardner Law Firm, P.C.
601 Pennsylvania Ave NW
Suite 900, South Bldg
Washington, D.C. 20004
(202) 271-0552

131pp

QUESTIONS PRESENTED FOR REVIEW

1. 26 USC§ 7431(a) creates a cause of action for a taxpayer against the United States and non-employees of the U.S. when a taxpayer's tax "return" or "return information" is "negligently or knowingly" disclosed "in violation of Internal Revenue Code (IRC) §6103(a).**A47-48,57-58**

All that is necessary to defeat a Rule 12(b)(6) motion to dismiss a IRC§7431(a) claim is a "concrete" allegation of an unauthorized tax disclosure, especially when the defendant has not answered the complaint. *Hrubeu v. Nat'l RR Passenger Corp.* 981 F.2d 962, 963, 964 (7th Cir. 1992). This Court in *Gomez* held allegations pertinent to defenses belong in the answer and later filings and shall not serve as the basis for a Rule 12(b)(6) dismissal.*Gomez v. Toledo, 446 U.S. 685 (1980).*

The taxpayer's complaint alleged a prima facie case for multiple violations of IRC§6103(a) by several employees and non-employees of the United States. In separate counts, the taxpayer alleged U.S. employees and others without legal authority, negligently, knowingly, or wilfully, and in bad faith disclosed his tax returns for tax years 1988, 1989, 1990, 1991, 1992 and his tax return information for tax years 1990 and 1993 to unauthorized persons in violation of IRC§ 6103(a). The U.S. never answered the complaint but alleged affirmative defenses in its Rule 12(b)(6) motion to dismiss all the IRC§7431(a) claims. The district court dismissed all the claims based on the mere assertion that affirmative defenses to the §6103(a) disclosures existed even though no evidence to support any of those defenses were presented.

Whether a taxpayer's fundamental 5th Amendment rights of due process or equal protection of the laws were violated when genuine issues of fact exist on the alleged defenses to the IRC 6103(a) violations and when the district court dismissed the §7431(a) claims based upon the mere assertion that affirmative defenses for the disclosures existed without requiring the U.S. to prove any of those affirmative defenses. *Scheuer v. Rhodes*, 416 U.S. 232 (1994); *Bell v. Hood* , 327 U.S. 678 (1945); *Conley v. Gibson*, 355 U.S. 41 (1957). Therefore, this case should be remanded to the district court to allow discovery, and require the U.S. to submit proof of each defenses to each tax disclosure.

2. The taxpayer's fundamental rights of privacy were violated by the U.S. when his IRS Chief Counsel supervisors and others used their positions to secure employee/Gardner's tax "return" and "return information". **The "tax administration" exception to IRC §6103(a) is limited to an employee's "official duties".** The Office of the Inspector General has the ***exclusive authority*** to detect and investigate misconduct allegations concerning IRS Chief Counsel employees. **A49,50, A53,54.** Mr. Gardner's IRS Chief Counsel supervisors did not work for the Inspector General's Office and did not have authority to investigate, receive, or disclose taxpayer/Gardner's tax returns or return information for personnel matters. ***A56,57-58,59.*** ***; Ruekert v. IRS***, 775 F.2d 208, 212 (7th Cir. 1985) Therefore, all tax disclosures made to and by Mr. Gardner's supervisors were "unauthorized" with no applicable exceptions and thus actionable under §7431(a).

Issues of first impression for this Court are whether the IRS can use the term "tax administration" as a catch-all provision to circumvent the general rule of confidentially established by Congress in IRC §6103(a) to protect a taxpayer's tax return and return information. See *Tierney v. Scheweiker*, 718 F.2d 449 (D.C.Cir.1983); *Ruekert at* 210. And whether the U.S. must prove that each employee for whom the tax administration exception of §6103(h)(1) is asserted, mad a disclosure to a person whose "official duties" required access to the taxpayer's "return" or "return information" for personnel matters, before IRC§7431(a) claims can be dismissed . *NTEU v. FLRA*, 791 F.2d 183, 187 (D.C.Cir. 1986)[Opinion rendered by Justice Ginsburg, formerly D.C. Circuit Judge]; *Ruekert* 212. Hence, the Rule 12(b)(6) dimissal must be reversed and this case remanded to the district court to identify each tax disclosure, to whom the tax disclosure was made, the purpose of each disclosure, and the "official duties" of the recipient of the disclosed tax information.

3. Twelve federal employees were sued in their individual capacity. The Attorney General elected to substitute the United States for only two of the defendants, Amador and Erdreich. The remaining 10 defendants were never certified as acting within the scope of their employ and never answered the complaint or otherwise entered an appearance in this case. The petitioner's motion for entry of default and default judgment were denied by the district court despite no opposition from any of the remaining 10 defendants. The district court dismissed the remaining 10 defendants pursuant to Rule 12(b)(2) and held it lacked personal jurisdiction over them.

Whether claims that the district court lacks personal jurisdiction over individual defendants under Rule 12(b)(2) is a "personal defense" that can only be raised by the defendants claiming that defense. *Jackson v. Ashton,* 33 U.S. (8 Peters) 148, 148-49 (1834), Hence, the district court's dismissal of the 10 defendants should be reversed and a default judgment entered against each of the 10 individual defendants who failed to appear or otherwise defend the action filed against them in light of the Fed.R.Civ.P.55 motion that was filed.

4. The complaint alleged multiple Privacy Act violations concerning federal agencies wilful failure to safeguard employee/Gardner's confidential personnel records. Specific sections of the Act including 5 U.S.C § 552a(b), 5 U.S.C.§ 552a(e)(7), (10) were referenced in the complaint. Petitioner also alleged violations of his 4th Amendment rights to privacy and against unreasonable searches and seizures, as well as his 5th Amendment rights to due process of law. Claims for violations of those rights were asserted in Counts 2,3,4,4A,7, 8, 9,16,17,18,19,20,22, 23, 24, 25,29,30, 32 ,33,34,36,37, & 39 of his complaint. Neither the U.S. nor its agencies ever answered the complaint. The Constitutional claims were never addressed by the court.

The district court mischaracterized the majority of the Privacy Act claims as wrongful disclosures of an agency tax records actionable under 5 U.S.C § 552a(b). The court then dismissed those reclassified claims for failure to state a claim for which relief could be granted because it held IRC §6103(a) preempts all wrongful tax disclosure claims made under 5 USC §552a(b) .A2,16.

✦The initial issue for review is whether a Rule 12(b)(6) challenge requires the district court to determine whether claims for relief exist under 5 U.S.C.§552a(e)(10), other sections of the Act plead, the U.S. Constitution, or any legal theory before granting a Rule 12(b)(6) dismissal *Scheuer; Bell*; *Conley* .

✦ An **issue of first impression** for this Court is whether the district court has concurrent jurisdiction over Privacy Act claims for willful disclosures of wage or tax records contained in an employee's personnel files and claims against the United States under IRC §7431(a) for unauthorized disclosures of his/her "return" or "return information" to the agency's personnel files. The Privacy Act claims constitute separate causes of action and survive the Rule 12(b)(6) dismissal of IRC §7431(a). *Sinicki v. U.S. Dept of Treasury,* 1998 US Dist LEXIS 2015 (S.D.N.Y.). Hence, the district court's Rule 12(b)(6) dismissal of the Privacy Act claims should be reversed and the case remanded to the district court to address the Privacy Act claims on the merits.

5. Congress made it "unmistakenly clear" when it enacted IRC§6103(a)(2) that States who have or had access to federal "returns" or "return information" are subject to the federal tax disclosure laws. The district court pursuant to Rule 12(b)(1) dismissed Counts 12 and 13 that alleged employees of the State of California and Franchise Tax Board violated the federal tax disclosure laws and that subject matter jurisdiction is conferred on the district court by IRC§ 7431(a)(2) over unauthorized tax disclosure claims. *Rueckert* at 210.

An issue of **first impression** for this Court is whether 26 U.S.C.§ 7431(a)(2) confers jurisdiction on the district court to adjudicate unauthorized federal tax disclosure claims made by employees of the State of California.

6. The threshold issue presented for review involves the "law of the case" and the denial of petitioner's 5th Amendment rights to due process of law. On November 25, 1997, the district court dismissed all of the defendants' Rule 12 (b) motions.**A42.** Then the court ordered all the parties to file dispositive motions and **limited** the petitioner's response to 15 pages **including** exhibits, appendices, and attachments. Several days later the court issued an order stating the defendants were not required to answer the complaint. The defendants re-submitted the exact same Rule 12(b) motions previously denied by the court. On January 29, 1999, the district court granted the Rule 12(b) motions that it had previously denied.

To invalidate a decision previously decided the court must find "clear error" or "manifest injustice". *Laffey v. NW Airlines, 740 F.2d 1071, 1082 (D.C. Cir.1984), cert. denied, (1986).* No "clear error" or "manifest injustice" was stated by the district court or existed for the court's January 29, 1999 reversal of its November 25, 1997 decision. Nor did the district court decide or notify Gardner that the Rule 12(b) motion was converted to a Rule 56 motion and direct him to present **all material evidence** pertinent to his claims as required by the federal rules.. *Neal v. Kelly,* 963 F.2d 453 (D.C. Cir1992); *Hudson v. Hardy,* 412 F.2d 1091 (D.C.Cir. 1969). Furthermore, the court's restrictive 15 page limit on petitioner's response prejudiced his 5th Amendment rights to

due process of law to **present all material evidence** to address a Rule 56 motion.

Whether the district court's unduly restrictive page limits and its January 29, 1999 Rule 12(b)(2) and 12(b)(6) dismissals of petitioner's claims violated his 5th Amendment rights to due process of law. Thus, the Rule 12(b)(2) and (6) dismissals should be reversed and remanded to afford Mr. Gardner the opportunity to present evidence on his claims.

7. The district court pursuant to Fed.R.Civ.P.12(b) dismissed only 43 of the 44 counts in plaintiff's complaint. Count 1 of the complaint involves Neal O. Abreu's disclosure of taxpayer/Gardner's 1993 "return information". Count 1 was not addressed by the district court nor did the D.C. Circuit render a decision on petitioner's motion for summary judgment on Count 1. In addition, the district court did not address the §7431(a) claims contained in Counts 2, 4A, 10, 16, 32, or 40. Nor did the district court dismiss all the claims of all the parties contained in Counts 17, 18, 21, 22, 25, 26, 27, 29, 30, 36, or 39.

Whether this Court should remand this case to the D.C. Circuit to render a decision on the district court's denial of petitioner's summary judgment motion initially appealed in *Gardner v. United States, et al.*, 98-5498 (D.C. Cir. 1998) and dismissed as premature,. and appealed to the D.C. Circuit again on February 6, 2000 when a final decision was rendered in *Gardner v. United States, et al.*, 99-5089 (D.C. Cir. 2000).

8.. The D.C. Circuit summarily affirmed the district court's Fed.R.Civ.P.12(b)(1) and (6) dismissals of the MSPB and two MSPB employees, sued in their individual capacity, "[b]ecause the district court correctly dismissed these three counts on the merits."**A18.** The D.C. Circuit also held *sua sponte* that "the MSPB did not act in a manner that was intentional or willful. **A18**

Whether the D.C. Circuit failed to adhere to binding precedent of this Court, acted prematurely, made factual determinations concerning wilfulness and intent that were not appealed to the court, and hence erroneously dismissed Gardner's claims against the MSPB and two of its employees *on the merits* prior to an answer or discovery, thus denying him his fundamental 5th Amendment right to due process of law to present evidence on his prima facie claims.

PARTIES TO THE PROCEEDING

Petitioner

BRUCE E. GARDNER

Respondents[1]

THE UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
STATE OF CALIFORNIA
MERIT SYSTEMS PROTECTION BOARD
FRANCHISE TAX BOARD
NEAL O. ABREU
STEVEN J. MOPSICK
ROBERT J. WILSON
ALBERT LARSON, III
BENJAMIN C. SANCHEZ
DENNIS A. QUINN
FRANK STOKES
WILLIAM REITAN
HELEN F. JAMISON
STACIA GREAUX
BEN L. ERDREICH
ANTONIO C. AMADOR

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1. The United States of America is representing the U.S. MSPB and has substituted itself for Ben L. Erdreich and Antonio C. Amador. None of the other individual defendants are represented by the Department of Justice.

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Gardner v. United States of America, et al.
No 98-5498 (D.C.Cir. 1998)

Significant Unpublished Orders

U.S. District Court Order dated November 25, 1997, denied all Fed.R.Civ. P. 12(b) motions without prejudice and directed parties to file all dispositive motions. **A43.**

U.S. District Court *sua sponte* Order dated December 9, 1997, held "defendants are not required to file their answers until resolution of the dispositive motions".**A42.**

D.C. Circuit Order dated August 4, 1999, held the court can decide material issues of fact and the merits of claims based on Rule 12(b)(6) motions. **A17.**

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

On June 9, 2000, the Court of Appeals for the District of Columbia (D.C. Circuit) rendered its initial decision in this case. On July 18, 2000 petitioner timely filed a Petition for

Rehearing and Suggestion For In Banc Review. On August 16, 2000, the D.C. Circuit denied the petition for rehearing and suggestion for in banc review.A45

On November 14, 2000, which is within 90 days from the date the petition for rehearing was denied, Gardner lodged a timely petition with this Court. By letter dated November 15, 2000, the Court allowed petitioner an additional 60 days to perfect his petition. This corrected petition is lodged within the additional 60 days granted by this Court.

CONSTITUTIONAL, STATUTORY & ADMINISTRATIVE PROVISIONS INVOLVED

The authority relied upon includes the due process clause of the 5th Amendment, the 4th Amendment right to financial privacy, and against unlawful searches and seizures, federal statutes stated herein, the Federal Rules of Civil Procedure, and the IRS' own rules. The authorities not set forth below are contained in the appendix.

4th Amendment, U.S. Constitution
5th Amendment, U.S. Constitution

Fed.R.Civ.P.12 **Defenses and Objections...**
(b) *Every defense*, in law or fact, to a claim for relief in any pleading, .., *shall be asserted in the responsive pleading* ..., except that the following defenses may at the option of the pleader be made by motion [emphasis added]:
(1) lack of jurisdiction over the subject matter,
(2) lack of jurisdiction over the person, ...
(6) failure to state a claim upon which relief can be granted...

26 U.S.C.§6103 Confidentiality and disclosure of returns and return information.

(a) General Rule. Returns and return information shall be confidential, and except as authorized by this title-

(1) no officer or employee of the United States,

(2) no officer or employee of any State...

shall disclose any return or return information obtained by him in any manner in connection with his service as such officer or an employee or otherwise or under the provisions of this section. [emphasis added].

26 USC§7431 Civil damages for unauthorized disclosure of returns and return information.

(a) In General

(1) Disclosure by employee of United States. If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civic action for damages against the United States in a district court of the U. S..

(2) Disclosure by a person who is not an employee of United States. In any person who is not an officer or employee of the United States knowing, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against such person in a district court of the United States.

5 U.S.C. 552a(e) Agency requirements. Each agency that maintains a system of records shall

(7): Maintain no records describing how any individual exercises rights guaranteed by the 1st Amendment...

(10) establish appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on who information is maintained;

5 USC §552a(g)(1) **Civil remedies.**-Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails t comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provision of this subsection.

5 USC §552a(g)(4) --In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which

was **intentional or willful**, the U.S. shall be liable to the individual in an amount equal to the sum of -

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court. [emphasis added]

STATEMENT OF THE CASE

Petitioner's fundamental 5th Amendment rights to due process and equal protection of the laws have been "ruthlessly violated"[1]. The lower courts have declined to enforce the privacy laws Congress enacted and the U.S. Constitution protections of privacy guaranteed petitioner.

Petitioner, a former IRS employee was told, at the outset by agency officials, that he had *no rights* as an IRS employee! *No rights* as a taxpayer to have the confidentially of his tax "returns" or "return information" protected from unauthorized disclosures. *No rights* as a citizen, to have the Privacy Act or the U.S. Constitution protect his privacy. *No rights* as a plaintiff, to offer evidence to prove his legally sufficient claims for relief. So far, they were right because the lower courts have not enforced the law concerning privacy violations against the government or held the government accountable for its unlawful acts.

The material issue of fact surrounding the IRC §7431(a) claims in this case is whether the tax disclosures were "unauthorized". The material issues of fact in the Privacy Act claims are whether a federal agency willfully or

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[1] *Bell v. Hood*, 327 U.S. 678, 683 (1945)

knowingly violated the Act. Those factual issues were alleged in petitioner's complaint but never presented or determined by the trier of fact. Petitioner was never allowed to offer evidence on the factual issues of his claims. Yet, petitioner's claims were dismissed with prejudice on procedural grounds and on the merits by the district court pursuant to Fed.R.Civ.R. 12(b)(6).

Misapplication of the Federal Rules of Civil Procedure was the means by which the district court denied Mr. Gardner his fundamental 5th Amendment rights to due process of law and equal protection of the law. An unopposed Rule 55 default motion filed against 10 individual defendants who each elected not to answer the complaint in this case or otherwise appear to defend the claims filed against them, was denied. The claims filed against each of the ten individual defendants was then dismissed by the court sua sponte for lack of personal jurisdiction, even though Rule 12(b)(2) is a "personal defense" that can be waived by a defendant and can only be asserted by the defendant claiming that defense **A40.**. None of the 10 defendants appeared or raised their personal Rule 12(b)(2) defenses. Yet, all ten defendants were dismissed by the district court.

Misapplication of Rule 12(b)(6) was the principal method relied upon to deny Mr. Gardner his fundamental rights to present evidence on his legally sufficient privacy violations claims. Denial of Gardner's privacy violations claims were done by the district court on the merits without affording petitioner the opportunity to present evidence on his claims. The district court also determined all assertions made by the U.S. in its Rule 12(b)(6) motion, including the affirmative defenses, as true, even though the U.S. never

tendered any evidence to support its defensive claims. After the district court's acceptance of the United States' affirmative defenses as proven facts, plaintiff's claims were summarily dismissed because no claims for relief existed. **A29.** In essence, the trial judge decided the facts and merits of plaintiff's claims based on respondents' mere assertion of affirmative defenses. No claims for relief existed because the trial determined the facts and then applied the law. **A34,35,40.** Furthermore, the court did not examine each disclosure.

The record reveals, the U.S. raised by motion, its affirmative defenses that the tax disclosures were authorized pursuant to the tax administration exception of 6103(h)(1). The issue of whether each alleged tax disclosure was unauthorized is a genuine issue of material reserved for the jury, who was designated as the trier of fact in this case, and not the judge, whose role was to apply the law correctly to the facts **A55,56,58.**

The district court did not require the U.S. to prove the specific tax administration purpose for making any of the tax disclosures or whether each tax disclosure was made to a person whose "official duties" satisfied the specific tax administration purpose for which the tax disclosure was made, as required by law. **A49,53,56.** Here, the specific tax administration purpose for the initial disclosures were a "suspicion" of off-duty employee misconduct by petitioner that purportedly affected the integrity of the tax administration system.**A3.**

The Office of the Inspector General has the *exclusive authority* under the tax administration exception of IRC§

6103(h)(1) to maintain the integrity of the tax administration. **A49.** Only employees of the Office of the Inspector General had the "official duty" to secure an IRS employee's tax return to investigate allegations of employee misconduct.**A57,50-53.** To maintain the integrity of the tax administration system, Inspection employees are required to report their factual findings to management without disclosing the IRS employee's actual tax return. *Reuckert v. IRS*, 778 F.2d 208, 212 (7th Cir. 1985). Inspection employees' tax disclosures are strictly limited to their written reports. The Code authorized Inspection employees to disclose their report to management without any recommended action, so management can determine any disciplinary action deemed necessary. **A53 .** This approach to balance the competing interests of protecting the privacy of IRS employees' tax returns with management's legitimate interests to discipline its employees never occurred in this case.

In the instance case, management breached the integrity of the tax administration system by its own personal unauthorized investigation of employee/Gardner based on their unfounded suspicions of his off-duty misconduct. **A54-55.** Management's unauthorized actions included using their positions to solicit and induce disclosures of taxpayer/ Gardner's tax return and return information to them, in order to terminate Mr. Gardner's 15 years of employment with the IRS. The initial tax disclosures to management and the subsequent tax disclosures by management to other unauthorized persons violated the strict non-disclosure laws of IRC 6103(a). **A55,56.**

IRC 7431(a) was enacted to hold all persons accountable for violations of the federal tax disclosure laws.

However, the district court declined to enforce the law and hold any of the respondents accountable for their unlawful acts. Instead, the court decided the disclosures were authorized, no claims for relief existed and, therefore, dismissed the taxpayer's claims with prejudice pursuant to Rule 12(b)(6). Thus, denying Mr. Gardner discovery and his 5th Amendment due process rights to show the disclosures were unauthorized.

Once the district court summarily dismissed the IRC §7431 claims, the Privacy Act claims were disposed of by misclassification, consolidation, and misapprehension of the facts and the law. Once again, Rule 12(b)(6) was the weapon of choice used to deny plaintiff his 5th Amendment due process rights. Once again, the merits were decided by barring the plaintiff from producing evidence on his claims and then holding no claims for which relief could be granted existed.

With respect to the claims against the MSPB, the D.C. Circuit held the agency's actions were not willful or intentional and summarily affirmed the dismissal of those claims, even though the factual issue of wilfulness was never decided by the district court nor appealed to the D.C. Circuit. A18. Furthermore, whether the MSPB acted willfully or intentionally is a factual issue to be determined by a panel of jurors and not a panel of appellate court judges.

The campaign to dismiss plaintiff's Privacy Act claims against the IRS and Treasury was accomplished by misclassifying all the 5 U.S.C.§552a(e)(7), §552a(e)(10), and

other claims[2] related to Gardner's personnel records, payroll records, and social security number, as wrongful disclosure claims under 5 U.S.C§ 552a(b). Next the district court misclassified all personnel "records" as tax records. Once all the claims were reclassified as wrongful disclosures of tax records, they were consolidated, and then dismissed as preempted by IRC §6103(a).[3]

With respect to Gardner's Constitutional claims underlying his statutory claims, they were simply ignored by the courts. In the rush to judgment, the district court neglected to rule on any of the Constitutional claims, Count 1, or all the claims of all the defendants on several other counts. Furthermore, Gardner's attempt to amend his complaint with leave of court was denied on November 25, 1997, despite the general rule of liberal leave to amend the complaint to cure any deficiencies.

November 25, 1997, was also the date, the district court denied the respondent's initial Rule 12(b) motions. With no answer required, the two year hiatus the district court took to rule on the Rule 12(b) motions previously submitted by the defendants has never been explained by the court. However, the Rule 12(b) dismissals occurred around the same time the trial judge became aware the petitioner

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[2] No requirement to exhaust administrative remedies is necessary when agency records are inaccurate. *MacPherson v. IRS*, 803 F.d. 479 (9th Cir. 1986).

[3] Other Privacy Act claim were dismissed based on the mere assertion of affirmative defenses which respondent was never required to prove.

sought a writ of mandamus against him in the D.C. Circuit.A22.

The writ of mandamus was sought because Count 1, which incorporated Count V and the attached exhibits undisputedly established Abreu, a U.S. employee, violated the federal tax disclosure laws by disclosing Gardner's 1993 tax return information in a California Unemployment Hearing. The tax disclosure had no relevance to the grounds for Gardner's termination and therefore was unnecessary to establish the agency's case. The D.C. Circuit dismissed the appeal as interlocutory holding the court lacked subject matter jurisdiction and no grounds for mandamus were established.A20-21.

Pursuant to the district court's November 25, 1997 Order to file dispositive motions, Gardner filed another summary judgment motion for Count I. The court imposed a 25 page limit on the summary judgment motion which included exhibits, appendices, and all attachments. The limit unduly prejudiced Gardner's right to submit all pertinent material supporting his motion. The prejudice to the taxpayer's unauthorized disclosure claims in Count I is evident from the denial of his summary judgment motion.

Subsequently, Gardner appealed the denial of the summary judgment motion on Count I , and the Rule 12(b) and 41(b) dismissal to the D.C. Circuit. The D.C. Circuit held the trial judge abused his discretion when he dismissed Gardner's case for failure to prosecute. The D.C. Circuit held Gardner's absence from the first motion hearing was based on a medical absence that was fully documented to the district court. However, the D.C. Circuit overlooked the

denial of the summary judgment motion on Count 1 that was now ripe for appellate review.

The D.C. Circuit specifically supported the linchpin of the district court's Rule 12(b)(6) dismissal of Gardner's IRC 7431(a) and Privacy Act claims by its opinion, which declined to recognize, only the Office of the Inspector General has authority, under the "tax administration exception" of IRC 6103(h)(1) to investigate allegations of employee misconduct.**A49-58.** The Office of the Inspector General was not used in this case by Gardner's supervisors to protect Gardner's rights of confidentiality as a taxpayer with the IRS' legitimate need to protect the integrity of the "tax administration system".**A47-48,** Accordingly, the tax disclosures were unauthorized. **A57-59;A54.A61-63.**

The D.C. Circuit declined to yield to the standing precedent in this Circuit established by Justice Ginsburg when she was sitting on the D.C. Circuit. In *NTEU* Judge Ginsburg held IRC§ 6103 is the *exclusive exception* to tax disclosures involving personnel matters. IRC §6103(l)(4)(A) allows access and disclosures to tax information "to the extent necessary" to protect the government's interest in a personnel matter.**A61.** No authority exists to disclose an employee's tax return or return information for personnel matters. Section 541(2)(62) of the IRS Handbook provides:

> If the disciplinary action is appealed to ...the Merits Systems Protection Board, the appeal...must be transmitted to the ...MSPB **without** returns or return information. [emphasis added].**A61.**

Accordingly, the blanket and wholesale disclosures of taxpayer/Gardner's entire 1988-1992 tax returns and 1990 and 1993 return information was not authorized by the IRC §6103(l)(4)(A) exception or any other exceptions to §6103(a).**A64-66.** This petition was filed to have the federal tax disclosure and Privacy Act laws enforced.

REASONS FOR GRANTING CERTIORARI

I. DENIAL OF FUNDAMENTAL CONSTITUTIONAL RIGHTS

"It is a necessary and well-settled rule that the exercise of jurisdiction by this Court to protect constitutional rights can not be declined when it is plain that the fair result of a decision is to deny rights". *Smithsonian Institute v. St. Johns*, 214 U.S. 19, 27 (1909).

A. The Right To Proffer Evidence To Have Legally Sufficient Claims Decided On The Merits Was Denied.

Petitioner's rights to proffer evidence to support his legally sufficient claims are fundamental constitutional rights that have traditionally been protected by this Court when denied by the lower courts. The facts in this case disclose that the district court ordered the defendants not to answer the complaint until after the dispositive motions were decided. In *Scheuer*[4], this Court held a Rule 12(b) dismissal is premature when the defendant never answers the complaint.

The cornerstone of petitioner's claims are unauthorized tax disclosures. The 7th Circuit held in

[4] *Scheuer v. Rhodes*, 416 U.S. 232 (1994).

Hrubeu[5], all that is necessary to defeat a Rule 12(b)(6) motion to dismiss a IRC§ 7431(a) claim is a "concert" allegation of an unauthorized tax disclosure, especially when the defendant has not answered the complaint. In this case, the taxpayer alleged specific concrete unauthorized tax disclosures by employees of the United States in Counts 1, 2, 4A, 5, 10, 11, 16, 32, 35, 38, 40, 41, and 44[6].A71-77. Yet, these counts were dismissed on the merits pursuant to Rule 12(b)(6), prior to discovery or an answer.

In *Tobey* the D.C. Circuit held, to have a Privacy Act claim, the complaint must allege an agency knowingly or wilfully disclosed a record about an individual which contains an identifying number. *Tobey v. NLRB*, 40 F.3d 469 (D.C.Cir.1994). The plaintiff alleged willful and intentional disclosures of his personnel record by the agency in counts 2,3,4,8,18,19,20,24,32,34,36,37, 38,39,42,43.A77-79 Petitioner also alleged separate claims of failure to safeguard petitioner's social security number and personnel records under 5 U.S.C.§ 552a(e)(10). A separate cause of action for a 5 U.S.C.§ 552a(e)(10) claim was recognized by this district court in *Pilon*[7] but ignored by the trial judge in this case..

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[5] *Hrubeu v. Nat'l RR Passenger Corp.* 981 F.2d 962, 963, 964 (7th Cir. 1992)

[6] Counts 12 & 13 alleged 7431 (a)(2) claims against employees of the State of California for unauthorized federal tax disclosures.

[7] *Pilon v. Department of Justice* 796 F. Supp 7, 12 (D.D.C. 1992); *Pilon v. Department of Justice*, 73 F.3d 1111 (D.C.Cir. 1996) [faxing a document to a former Justice aid was a "disclosure

Furthermore, the D.C. Circuit held in *Hollis*[8] disclosure of "payroll records" are covered by the Act. A78-80. The district court misclassified all the personnel records as tax records not covered by the Act and then dismissed all the Privacy Act claims under Rule 12(b)(6), as preempted by IRC§ 6103(a).

In *Conley*[9] this Court stated "[t]he purpose of pleadingg is to facilitate a proper decision on the merits." *Id* at 48. The district court is under a duty to examine the complaint to determine if the admitted facts provide for relief under *any possible legal theory. Doe v. Dept of Justice,* 753 F.2d 1092, 1104 (D.C.1985). Leave to amend shall be granted freely. *Moore v. Agency for Int'l Development,* 994 F.2d. 874 (D.C.Cir. 1993). Rule 12(b) motions are sparingly granted and, even then, with caution in order to make certain that plaintiffs are not improperly denied their rights to have their claims adjudicated on the merits. *Conley at 48.* In this case, petitioner was improperly denied his rights to have his claims adjudicated on the merits.

Rule 12(b) and this Court's decision in *Gomez* held allegations pertinent to defenses, such as, IRC§6103(a), 5 U.S.C.§552a(b),(e), and the applicability of IRC§7852(e) to personnel records belong in the answer and shall not serve as the basis for a Rule 12(b)(6) dismissal. Furthermore, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are

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[8] *Hollis v. Dept of the Army,* 856 F.2d 1541 (D.C.Cir. 1998)

[9] *Conley v. Gibson,* 355 U.S. 41 (1957)

jury functions, not those of a judge". The D.C. Circuit never addressed that important question of law. In this case, respondents were Ordered by the trial judge *not* to answer the complaint, plaintiff was *not* allowed discovery, and the trial judge relied on affirmative defenses asserted in a motion as the basis for dismissals with prejudice.

This Court has historically protected litigants' rights to have their legally sufficient claims heard on the merits. In *Bell*[10], this Court held "if allegations have any foundation in truth, the plaintiff's legal right have been ruthlessly violated" if he is not allowed to proffer evidence on his claims. *Id 683.* Mr.Gardner's "legal rights have been ruthlessly violated". It is clear that the fair result of the lower court's decision is to deny Mr. Gardner his 5th Amendment rights to due process of law. This Court can restore Mr. Gardner's rights and afford him the opportunity to proffer evidence on his legally sufficient claims by exercising it's supervisory powers of certiorari review.

B. The Right to Have Genuine Issues Of Material Fact Decided By The Trier of Fact Was Denied.

It is well settled that summary judgment can not be used to deprive a litigant of a full trial on genuine factual issues, which is precisely what the district court did in this case. *Pollen v. CBS, Inc.* 368 464 (1962); *National Life Ins. v. Silverman,* 454 F.2d 899 (1971). The D.C. Circuit in *Tijerina*[11] addressed Privacy Act violations and held genuine issues of material fact can not be disposed of summarily. *Id.*

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[10] *Bell v. Hood,* 327 U.S. 678 (1945)

[11] *Tijerina v.Walters, 821 F.2d 789 (D.C.1987).*

799. The 4th Circuit in *Scrimegeour*[12] where both IRC§ 7431(a) claims and Privacy Act claims were at issue, held intentional or wilful conduct is a matter for the trier of fact to determine.

The factual issues involved in these IRC§7431(a) claims are whether each tax disclosure made by each person, whether an intra, inter, or extra agency tax disclosure, was made for the *limited purpose* stated in the Code and *to a* person *authorized to receive* the tax information disclosed. **A55.** As set forth herein, the tax disclosures purportedly made pursuant to the IRC§6103(h)(1) tax administration exception were for the limited purpose of investigating an employee and made to petitioner's supervisors based on their suspicions of petitioner's off-duty misconduct.**A3** . The record is clear that those tax disclosures were unauthorized because only the Treasury Inspector General's Office is authorized access to returns and return information for the specific purpose of investigating allegations of employee misconduct .**A49,50,51-54.**

The district court held [b]ecause a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." **A25.** However, petitioner was deprived of an answer to his complaint and deprived of discovery to determine the facts. The facts must be clear and undisputed prior to applying the law for summary disposition. *Celotex Corp v. Catrett*, 477 U.S. 317 (1986) [Certiorari Granted from D.C. Circuit]

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[12] *Scrimgeour v. IRS, U.S.*, 149 F.3d 318 (4th Cir. 1998)

The district court's premature Rule 12(b)(6) dismissal denied petitioner the opportunity to determine the facts which included:

1. identifying the ***source*** of each tax disclosure,
2. identifying the ***recipient*** of each tax disclosure,
3. determining the "specific purpose" for each tax disclosure, &
4. determining the "official duties" of each recipient of the disclosed tax information.

These four factual determinations must occur before the law can be applied to the facts. The absence of discovery and the trial judge's Order prohibiting an answer to the complaint until after the dispositive motions are decided "railroaded" petitioner into a premature summary judgment. *Celotex Corp* at 326.

The law to be applied in this case also is a matter of genuine dispute. IRC§6103(a) places the burden of proof on the U.S. to prove the specific exception, if any, related to each claimed tax disclosure. This Court in *Celotex* stated summary judgment is inappropriate when the movant has yet to prove its affirmative defenses. *Id* 324. The trial judge can not merely accept the assertion of the U.S., that exceptions to the tax disclosures exists, as he did in this case. **A29.** Rule 12(b) requires the U.S .to plead its affirmative defensives in an answer and then prove whether an exception exists for each disclosure. *Infra*, p. 2.

The district court can not try issues of fact or presume facts because the "truth" must be known before summary judgment is appropriate.. *Pollen*. The district court is only empowered to determine whether there are issues of fact to

be tried, not to determine the facts. *Associated Electric Cooper Inc. v.. Morton,* 507 F.2d 1167, 1178, n (D.C.1974); *Southern Distributing Co v. Southern Inc.*, 574 F.2d 824 (5th 1978). In this case tax disclosures were made by IRS employees, Treasury employees, MSPB employees, and State of California employees but the four prong factual test for determining whether any exceptions to each unauthorized tax disclosure exist was not allowed by the trial judge. The Rule 12(b)(6) dismissal on legally sufficient claims deprived this litigant of discovery and his 5th Amendment rights to a full trial on the genuine issues of material fact.

C. Right to Default Judgments Against Individual Who Elected Not To Appear or Defend The Action Was Denied.

A Rule 12(b)(2) dismissal over a defendant is a "personal defense" that can only be raised by the defendant to whom the defense belongs. *Jackson v. Ashton*, 33 U.S. (8 Peters) 148, 148-49 (1834). Neither the United States nor the court can assert this waivable personal defense. *Falkowski v. EEOC*, 764 F.2d. 907, 911 (D.C.Cir. 1985).

The Attorney General decided only two of the 12 individual defendants in this case were acting within the scope of their employment and substituted the U.S. for them. The remaining 10 defendants were left to fend for themselves.**A40.**

None of the remaining 10 individual defendants appeared or otherwise defended this action after being duly served. Gardner filed motions for entry of default and default judgments as provided for by Rule 55 against each non-appearing defendant. Accordingly, default judgments

should have been entered against each defendant. Failure to enter default judgments denied Mr.Gardner his 5th Amendment rights to due process of law and equal protection of the law.

II. IMPORTANT QUESTIONS OF FEDERAL LAW NOT DECIDED BY THE D.C. CIRCUIT.

A. Petitioner's Rights to Equal Protection of The Laws Was Violated.

Petitioner, a former IRS Chief Counsel employee, was not afforded the same rights under the law concerning protection of his confidential tax returns and return information that was afforded IRS, employees and non-IRS employees.A48,A55. The lower courts did not address this issue.

"Among the most basic of a taxpayer's privacy rights is an expectation that the Service will keep personal and financial information confidential. Taxpayers also have the right to expect that the Service will collect, maintain, use, and disseminate personally identifiable information and data only **as authorized by law and as necessary** to carry out agency responsibilities." Internal Revenue Policy P-1-1.A47. [emphasis added]

."The Service will safeguard the integrity and availability of taxpayers' personal and financial data and maintain fair information and record keeping practices to *ensure equitable treatment of all taxpayers.* IRS employees will perform their duties in a manner that will recognize and enhance individuals' right of privacy and will ensure that their activities are consistent with law, regulations, and good

administrative practice."A48. These rights and safeguards were not afforded taxpayer/Gardner because of his former employment with the IRS.

In *NTEU*, Justice Ginsburg held when she wrote the majority opinion as D.C. Circuit Judge, that the laws concerning unauthorized tax disclosures apply equally to protect the confidential returns and return information of IRS employee, as well as non-employees. *NTEU v. FLRA*, 791 F.2d. 183, 187 (D.C.Cir.1986) . Judge Ginsburg stated:

> Confidentially of a taxpayer's information would be undermined if IRS could not strictly enforce a scheme requiring high level scrutiny of disclosure requests. Moreover, the same privacy considerations that call for central review of disclosures to non-employees also required careful control of disclosures within the IRS. Just as the taxpayer's privacy is impermissible invaded when the unauthorized recipient is an outsider, so it is invaded unlawfully when an IRS employee obtains the information. *Id. 187*

Equal application of the tax disclosure laws in the present case reveal multiple unauthorized tax disclosures and violations of the Privacy Act that have not been enforced by the lower courts with respect to taxpayer/ Gardner's rights.

B. The "Tax Administration Exception" Applies Only When The *Recipient's* "Official Duties" Involve The Limited Administrative *Purpose* For The Disclosure .

The gravamen of the D.C. Circuit's opinion is that the "tax administration exception" to IRC§6103(a) applies to every U.S. employee who disclosed taxpayer/Gardner's confidential tax "returns' or "return information". However, the term "tax administration" is not a catch-all provision

enacted to circumvent the general rule of confidentially established by Congress in §6103(a).*Tierney*,455-456.The tax administration exception of IRC§6103(h)(1) authorizes tax disclosures when the "official duties" of the recipient of the tax returns or return information need the information to administer their limited role in our tax administration system. *Id 455; NTEU* 184. The U.S. is held accountable when its employees disclose "return" or "return information" to any person whose "official duties" do not match the limited purpose for which the tax disclosure was made.[13] *NTEU*, 187.

In essence, every IRS employee has a role in tax administration but their access to "return" and "return information" is restricted to a "need to know" basis. A55,56. Congress viewed simple browsing by IRS employees through tax files, even if no tax return information was disclosed serious enough to merit sanctions. See *Taxpayer Browsing Protection Act,* 26 USC §7213A. Obviously, actual tax disclosures, that have occurred in this case, would also warrant sanctions against the government.

The D.C. Circuit failed to determine the "official duties" of any of the recipients of taxpayer/Gardner's tax "return" and "return information".A56,59-60. Therefore, the D.C. Circuit's decision that the tax administration exception of IRC§6103(h)(1) applied to every tax disclosure that was made is inherently flawed and is contrary to the law which is to restrict disclosures. The appropriate inquiry would have disclosed, the "official duties" of Chief Counsel employees,

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[13] Likewise, the States are held accountable pursuant to IRC 7431(a)(2) when its employees make unauthorized disclosures of federal tax returns. IRC 6103(a)(2). A65.

like Abreu and Steven Mopsick, did **not** include investigation of their suspicions of employee/Gardner's off-duty misconduct or tax audits of taxpayer/Gardner's tax returns. **A54,56,57-60.** Nor are management officials required or expected to conduct state tax investigations of IRS employees. **A68.** Therefore, the tax administration exception is **not** applicable to the prohibited investigations conducted by Gardner's supervisors. **A54,49,67,50**

The Code and IRS rules clearly state, *only the Inspector General's Office has the authority under the "tax administration" exception of IRC §6103(h)(1) to gain access to "return" and "return information"* for tax administration purposes. **A49-58.** "The Office of Inspector General, Department of Treasury, is responsible for investigating alleged misconduct by ... Office of Chief Counsel employees." **A50.** The complaint procedures require a written referral to the Office of the Inspector General. **A51.** The record is clear that neither Abreu nor Mopsick made any referrals to the Inspector General's Office as required by the IRS' own rules but rather conducted their own unauthorized investigation to terminate the 15 year employment of the sole remaining minority attorney in the IRS Sacramento District Counsel's Office.**A3.**

It is well settled that a federal agency can not ignore or intentionally circumvent a mandate imposed upon it by federal statute and must follow it own rules. *Accardi v. Shaughessy,* 347 U.S. 260, 265 (1954). The rights of all citizens are in jeopardy if an agency is not held accountable for violations of the laws specifically enacted to restrain and regulate its conduct. IRC§6103(a) was enacted to restrict access to tax information. In the instance case, IRS, Treasury,

and MSPB employees made unauthorized tax disclosures, and ignored the law, its own rules and regulations because Gardner, a former IRS employee, had no rights!

This Court held in *Chapman*[14] and *Navigation*[15] that a court must exercise it jurisdiction over rights arising under statutes of the U.S. enacted to protect constitutional rights. IRC§6013(a),§7431(a) and the Privacy Act were enacted to protect Gardner's 4th & 5th Amendment Constitutional rights. Accordingly, this Court should feel compelled to exercise its jurisdiction to prevent the denial of Mr. Gardner's statutory and constitutional rights of privacy. *Id.;Smithsonian Institute at 27.*

C. IRC 6103(l)(4)(A) Is The *Exclusive Exception* For Personnel Matters.

Neither the district court nor the D.C. Circuit addressed which specific exception to IRC§ 6103(a) was relied upon as the basis of the Rule 12(b) dismissals. **A8** [fn3];.**A29.** Judge Ginsburg held in the controlling *NTEU* case that IRC§ 6103(l)(4) is the exclusive exception for personnel matters and §6103(h)(1) is not applicable to tax disclosures involving personnel matters. *NTEU* 186-87.

Likewise, IRC§ 6103(h)(4) which authorizes tax "disclosures in judicial and administrative tax proceedings" is not applicable to tax disclosures based on personnel matters. *Id.* The tax administration *purpose* behind IRC§6103(h)(4) is to allow tax disclosures only to litigate tax issues while IRC§

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[14] *Chapman v. Goodnow*, 123 U.S. 540, 548 (1887)

[15] *Navigation Co. v. Homestead*, 123 U.S. 552 (1887).

6103(l)(4)(A) allows disclosures for IRS employee personnel matters but **only to the extent necessary** to protect the government's interest. Under IRC§6103(l)(4)(A) an employee/taxpayer's "return" and "return information" is prohibited from disclosure in a personnel matter while that is not the case in IRC§6103(h)(4) disclosures **.A61.**

The facts in this case demonstrate wholesale and blanket disclosures of taxpayer/Gardner's entire 1988-1992 tax returns, his entire 1990 tax audit file, and his 1993 return information. These wholesale tax disclosures are *per se* violations of IRC§6103(a) with no applicable exceptions. The lower court did not enforce the privacy laws which were enacted to protect taxpayer/Gardner's 4th Amendment rights against unlawful searches and seizures. This Court held it would exercise its jurisdiction when statutes enacted to protect constitutional rights are not enforced. *Chapman; Navigation.* Accordingly, petitioner requests certiorari to enforce his rights of privacy.

D. IRC§6103(a)(2) *Explicitly* Holds State Employees Accountable For Unauthorized Tax Disclosures.

The D.C. Circuit did not address the State of California's liability to taxpayer/Gardner for its employees violations of IRC §6103(a)(2). The States' historical misuse of federal tax records was a specific concern of Congress in enacting §6103(a)(2).[16] Congress clearly considered and abrogated the 11th Amendment with respect to federal tax information when it enacted IRC § 6103(a)(2) and §7431(a)(2). Furthermore, the California defendants waived

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[16]H.R. Rep No.94-658, 94th Cong. d. Sess. 318, reprint in 1976 U.S. Code Cong. & Ad. News 2897, 3766.

their sovereign immunity and consented to be sued in federal court when it executed joint Agreements with the IRS and required federal tax returns to be attached to their returns. *Pennhurst State Scholl & Hosp v. Halderman*, 465 U.S. 89, 99 (1984). Hence, the district court had subject matter jurisdiction over the California defendants and the Rule 12(b)(1) dismissal should be reversed so the California defendants can be held accountable for violating taxpayer Gardner's federal right to privacy. **A65.**

III. CONFLICTS EXISTS AMONG THE CIRCUITS ON WHETHER IRC 6103(a) SUPPLEMENTS 5 USC§552A(b) or PREEMPTS IT.

A split in the Circuits exists on an issue of first impression for this Court, whether the Code preempts the Act and provides the exclusive remedy for disclosures of tax records. *Sinicki v. Department of Treasury*[17], 1998 U.S. Dist LEXIS 2015 (S.D.N.Y.) However, the IRS rules clearly recognize that the Privacy Act applies to tax records in the IRS's custody. **A47,51,62,63,64,66.**

A majority of the Circuits recognize separate claims exist under IRC§6103 for negligent unauthorized access to tax records and 5 USC§552a(b) were wilful disclosures of tax records must be established. The 2nd Circuit in *SL*

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[17] This case also involved IRC 7431(a) claims and Privacy Act claims of an IRS employee. Unauthorized tax disclosures of Sinicki's tax return information occurred which was placed in her personnel file.

Mercantile Corp[18], 4th Circuit in *Scrimgeour*[19], the 5th Circuit in *Wilkerson*[20], the 8th Circuit in *Taylor*[21], and the 9th Circuit in *Long*[22] have had no difficultly in deciding both the IRC§ 6103(a) and 5 U.S.C.§ 552a(b) disclosure issues when presented in the same case.

A minority of the Circuits 7th, D.C., and recently the 5th have held the Code preempts the Act. The *Sinicki* case addressed the precise conflict presented here and relying on the legislative history and this Court decision in *German* held:

- ✦ no legislative intent to repeal the Act exists &
- ✦ the Act and the Code are not in conflict and can co-exist. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

The legislative history of IRC§6103(a) expressly states: "**In addition** to the provision of the Internal Revenue Code...the Privacy Act of 1974 (Public Law 93-570)...affects the disclosure of tax information." House Report, p. 3746. [emphasis added].Congress recognized that under the Act, tax records could be disclosed to other agencies without prior consent of the taxpayer based upon the "routine use" exception.**A35.** Congress enacted IRC§6103(a) to close that

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[18] *SL Mercantile Corp v. Maloney*,909 F.2d (2d Cir. 1990)

[19] *Scrimgeour v. IRS, US*, 149 F.3d 318 (4th Cir. 1998)

[20] *Wilkerson v. U.S.*, 7 F.3d 112, 115 (5th Cir. 1995)

[21] *Taylor v. IRS*, 891 F.2d 222 (8th Cir. 1989)

[22] *Long v. IRS*, 891 F.2d 222 (9th Cir. 1989)

loophole and focus on the "unique aspects" of tax returns and return information to compliment the Act. *Sinicki 8-9.*

In *O'Donnel*[23] the Act was held to compliment other remedies one may enjoy, just as in this case. The 3rd Circuit in *O'Donnel* rejected the Veteran Administration's argument that the Privacy Act provides the exclusive remedy for wrongful disclosure of records in violation of one's privacy. The Court held the Act became law after the Federal Tort Claims Act and Congress did not expressly limit any privacy based claims. The D.C. Circuit in *Pilon* also said the more specific protection afforded plaintiff by 5 U.S.C.§ 552a(e)(10) provides "an additional basis for seeking relief" to compliment 5 U.S.C.§552a(b). *Id* at 1085. The same reasoning applied by the D.C. Circuit in *Pilon* and the 3rd Circuit in *O'Donnel* applies with respect to the complimentary sections of 6103(a) and 5 U.S.C.§552a(b) in this case.

In *Cheek*[24], the 7th Circuit balanced the public's right to know under 5 USC§ 552 of the Freedom of Information Act (FOIA) with the protections of confidentially of tax records under the Privacy Act. The competing issues of disclosure under the FOIA and non-disclosure under the Privacy Act are not present in this case. In this case, the confidentiality principles of the Privacy Act also are the basic premise for the tax disclosure laws and no competing principles exist here, as in *Cheek.* Accordingly, the D.C. Circuit's reliance on *Cheeks* was misplaced. See *Sinicki.*

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[23] *O'Donnell v. U. S.*, 89 F.2d 1079 (3rd Cir. 1989)

[24] *Cheek v. IRS*, 703 F.2d 271 (7th Cir. 1983).

The D.C. Circuit's reliance on *Lake* is also misplaced. By the appellate court's own admission, *Lake* does not involve the premise issue presented here. **A14**; *Lake v. Rubin*, 162 F.2d 113 (D.C.Cir. 1998). *Lake* concerned access by taxpayers to their own records. The D.C. Circuit in relying on *Cheeks* held where two provisions are inconsistent the more specific one overrides the other. Once again IRC§6103(a) & 5 USC§552a(b) are complimentary and supplement each other.

The 7th Circuit's decision in *Rueckert*, is more akin to the facts and issues concerning the confidentially of a taxpayer/employee's tax records than *Cheek*. Two years after *Cheek*, the 7th Circuit in *Rueckert*, balanced the interests of the confidentially of a taxpayer's returns with a tax agency's need to discipline its employees for misconduct relating to his tax returns. The 7th Circuit approved the use of the tax agencies Inspector General's Office to conduct an impartial *and limited investigation* related to the tax agency's employee's returns and charged that office with the 'official duty" of protecting the rights of both parties. But, even tax disclosures made by the agency's Inspector General's Office to management were severely restricted. The taxpayer/ employee's tax return could **not** be disclosed to management and it ***was not disclosed*** to management in *Rueckert*. Based on *Rueckert*, wholesale tax disclosure to management and by management constitute multiple IRC § 6103(a) violations for which no exceptions exist. *Rueckert* at 209-210.

Repeal by implication is not favored and the disclosure sections in the Act and Code can mutually coexist. *Germain; Sinicki at 3,6.* This Court should resolve the conflict among the Circuits and make it clear to all Circuits

that separate causes of action exist for disclosures of tax records under the Act and the Code. Accordingly, certiorari should be granted to resolve the conflict among the Circuit Courts concerning any implied preemption of the 5 USC§552a(b) by IRC§ 6103(a).

CONCLUSION

No issue is more important to this Nation than a citizen's rights to privacy and due process of law.A47,48. "The assurance of privacy secured by IRC§6103 is fundamental to a tax system that relies upon self-reporting." *NTEU* at 184. A fundamental government obligation is to secure and maintain confidence in the "records" maintained on its citizens. A64. These fundamental rights afforded citizens and guaranteed by the 4th and 5th Amendments of our Constitution were denied Mr. Gardner.

Mr. Gardner was denied the fair and impartial process by which the privacy laws should have been enforced against the government. To preserve the integrity of the legal system and instill confidence in petitioner and other U.S. citizens that their privacy rights will be protected and enforced when violated by the government, this petition for a writ of certiorari should be granted.

Respectfully submitted this 14th day of January, 2001

Bruce E. Gardner, Esq.

APPENDIX A

United States Court of Appeals
For The District of Columbia Circuit

Argued April 13, 2000 Decided June 9, 2000

No 99-5089

Bruce E. Gardner,
Appellant

v.

United States of America, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. **96cv01467**)

Bruce E. Gardner, appearing *pro se,* argued the cause and filed the briefs for appellant.

Annette M. Wietecha, Attorney, U.S. Department of Justice, argued the cause for the Federal Appellees. With her on the brief were *Jonathan S. Cohen*, Attorney, and *Wilma A. Lewis*, U.S. Attorney. *R. Craig Lawrence* and *W. Mark Nebeker*, Assistant U.S. Attorneys, entered appearances.
Steven J. Green, Dona S. Kahn and Mark D. Silverschotz were on the brief of appellees State of California and California Franchise Tax Board.

Before: Edwards, *Chief Judge,* Henderson and Rogers, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* Rogers.

Rogers, *Circuit Judge:* Bruce E. Gardner appearing *pro se* appeals the dismissal of his complaint alleging violations of federal and state law by federal and state authorities, primarily as a result of the disclosure of his tax returns and tax information, under Fed.R.Civ.P. 12(b)(1),(2), & (6) and 41(b). For the reasons set forth in a companion case, *Gardner v. United States,* 200 WL 562820, No. 99-5065 (D.C. Cir. May 19, 2000), the dismissal under Rule 41(b) cannot be affirmed. However, **we conclude that the dismissal was proper under Rule 12(b) essentially for the reasons set forth in district court's opinion of January 29, 1999.** We need address only two of Mr. Gardner's contentions for, as the district court's opinion makes clear, his other contentions fail under well-settled law.[emphasis added]. We hold first, that the disclosure of Mr. Gardner's tax returns and tax information within the Internal Revenue Service was permissible under the tax administration exception to the nondisclosure requirements of 26 U.S.C.§6103 (1994 and Supp. IV 1998), and second, that Mr. Gardner's exclusive remedy for the disclosures of his tax records is under the Internal Revenue Code, and not the Privacy Act, 5 U.S.C.§552a (1994 and Supp. IV 1998). Accordingly, we affirm.

I.

As noted in the companion case, Mr. Gardner formerly worked as an attorney in the Sacramento, California Office of Chief Counsel to the Internal Revenue Service ("IRS") at the Treasury Department. His employment was terminated for alleged failures to comply with federal and state tax laws. He

filed three complaints in the district court, relating to his compliance with federal and state tax laws[1], after unsuccessfully pursuing state and federal administrative remedies.[1] We summarize the background to his contentions that the disclosure of his tax returns and tax information violated federal law and that he is entitled to relief under the Privacy Act as well as the Internal Revenue Code.

Briefly put, Mr. Gardner's supervisors in Sacramento, California, **suspected as early as 1992** that he was not in full compliance with federal and state tax laws.[2][emphasis added] When he agreed in 1994 to provide relevant information and then failed to do so, **his supervisors obtained his federal tax returns and tax audit directly from IRS Offices in Houston, Texas, and Fresno, California, and his state returns and tax information from state agencies in California** and Maryland, where he had lived while working

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[1] *Danese v. IRS*, 11 MSPR 97 (1987)

[1]**Noted added-** Gardner was denied his rights to seek federal administrative remedies. *Gardner v. MSPB, #00-552 (U.S. Supreme Court 8/15/00).* The state proceeding was an unemployment hearing in which Gardner was not allowed to testify. None of the district court complaints Gardner filed related to his non-compliance with federal or state tax laws but rather addressed the governments' failure to adhere to the tax laws, privacy laws, and the Constitutional law.

[2]**Note added-** If so, Abreu and Mopsick were required to make a referral to the Inspector General's Office but they did not!

for the IRS in the District of Columbia[3].[emphasis added]. Upon concluding that Mr. Gardner had taken several unsupportable positions on his federal income tax returns for 1990-92[4] and that he had not timely filed his Maryland income tax returns for 1988-90[5], his supervisors offered him a chance to resign. When he refused, they commenced disciplinary proceedings and his employment was terminated November 26, 1994, for failure to file proper federal and state income tax returns.[6] Thereafter, his application for unemployment benefits was denied by the California Unemployment Insurance Appeals Board, and his challenge to his termination was rejected by the Merit Systems Protection Board.[7] He then filed a forty-four count complaint

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[3]**Note added**- Maryland determined Gardner was not required to file tax returns in that State. **A**

[4] **Note added**: Neither Gardner's 1991 nor 1992 federal tax returns were ever audited or adjusted by the IRS. Gardner was denied an administrative IRS appeal of the $1,680 1990 tax adjustment, nevertheless **no 1990 tax debt** ever arose because the IRS failed to comply with the deficiency notice requirements prior to the expiration of thc statute of limitation

[5] **Note added**:Maryland held Gardner was not required to file tax returns because Gardner was a resident and domiciliary of Houston, Texas. See **Appendix**

[6] **Note added**: The record contains no allegation that Gardner was terminated for failure to file proper state income tax returns.

[7]**Note added**: MSPB unlawfully denied Gardner an administrative hearing. See Gardner v.MSPB #00-552 (U.S. Supreme Court 8/15/00)

in the district court alleging,[8] among other things, that the Treasury Department, the IRS[9], and individual IRS employees violated the Internal Revenue Code and the Privacy Act through intra-IRS disclosures of his tax return information[10] while he was under investigation by the IRS and during the state and federal administrative proceedings that he commenced after his employment was terminated.[11] Following the filing of dispositive motions by the defendants, the district court dismissed the complaint under Fed.R.Civ.P. 12(b) and 41(b).

The court has concluded in a companion case that the Rule 41(b) dismissal of Mr. Gardner's complaint must be reversed. *Gardner*, 2000 WL 562820, at *1,3-5. The question remains whether Mr. Gardner has demonstrated that the district court erred in dismissing his complaint under Rule 12(b). Most of his contentions raise issues that are well-settled in law adverse to him, and we need not repeat the district court's

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[8] **Note added**: This complaint was filed on June 26, 1996

[9] **Note added**- The bias investigation was conducted by Gardner' supervisors and **not** by the impartial Inspection General's Office that has authority to conduct personnel investigations for "tax administration" purposes under IRC 6103(h).

[10]7 **Note added**: The court did not address the inter-agency unauthorized tax disclosures.

[11] **Note added** -IRS also made unauthorized tax disclosures to Treasury, State of California, and MSPB personnel.

opinion.[12] There are, however, two contentions that require some explication.

II.

First, Mr. Gardner contends that the district court erred in ruling that the disclosure of his tax records fell within the exception to nondisclosure of §6103(h)(1) for " tax administration purposes." In making this contention he relies on our decision in *National Treasury Employees Union v. Federal Labor Relations Board ("NTEU")*, 791 F.2d 183 (D.C. Cir.1986), and therein lies the need for clarification.

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[2]The district court lacked personal jurisdiction over the individual IRS employees-appellees, because Mr. Gardner failed to allege the requisite contact between these California and Texas residents and the District of Columbia under the Constitution and the District's long-arm statute. *See, e.g. International Shoe Co. v. Washington, 326 U.S 310, 316 (1945); D.C. Code Ann 13-423 (1995).* Mr. Gardner's defamation claim against the United States is barred, because suits for libel or slander are prohibited under the Federal Tort Claims Act. 28 U.S.C.§2680(h)(1994). The district court lacked subject matter jurisdiction of Mr. Gardner's claims for alleged violations of the Family Leave Act and the Whistleblower Protection Act, because he failed to allege that he had exhausted his administrative remedies, as required under the Civil Service Reform Act. *Hubbard v. EPA*, 809 F.2d 1, 5 (D.C. Cir. 1987); *Carducci v. Regan*, 714 F.2d 171, 174-75 (D.C. Cir. 1983). Mr. Gardner's claims against the California state defendants were barred by the Eleventh Amendment, which prohibits suit against a state or a state agency in federal court absent their consent or clear congressional abrogation of immunity, neither of which was present here. *See, e.g, Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54-55 (1996)*

The Internal Revenue Code generally prohibits the disclosure of tax returns and tax information. Under 26 U.S.C. §6103(a), "return and return information shall be confidential" and "no officer or employee of the United States ...shall disclose any return or return information" unless authorized by statute. As the court observed in NTEU:

> This general ban on disclosure provides essential protection for the taxpayer; it guarantees that the sometimes sensitive or otherwise personal information in a return will be guarded from persons not directly engaged in processing or inspecting the return for tax administration purposes. The assurance of privacy secured by §6103 is fundamental to a tax system that relies upon self-reporting.

Id. at 184. In recognition of competing concerns, however, the Code includes a number of exceptions. Two are relevant here.

Under §6103(h)(1), "[r]eturns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose **official duties** require such disclosure for tax administration purposes." 26 U.S.C. §6103(h)(1). [emphasis added] Another provision, §6103(h)(4), authorizes disclosure of returns and return information "in a Federal or State judicial or administrative proceeding pertaining to tax administration ... if the taxpayer is a party to the proceeding ..."[3] If the internal IRS investigation of Mr. Gardner's tax

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[3] In the district court, the federal appellees also relied on §6103(l)(4)(B), which authorizes the Secretary of the Treasury to

history[12] and the related state and federal administrative proceedings commenced by Mr. Gardner were "tax administration" matters, then the disclosures were proper under §6103(h)(1) and (4). We therefore address the scope of the tax administration exception of §6103(h)(1) and (4) with respect to these disclosures.

The Internal Revenue Code defines "tax administration" fairly broadly, to include "the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State)...," *id.* §6104(b)(4)(A)(I), as well as enforcement and litigation under the tax laws. Id.§6104(b)(4)(B). While the language of this exception appears readily applicable to the daily work that IRS employees do in auditing and otherwise checking taxpayer returns and tax information, it is perhaps not as clearly applicable to internal personnel investigations. Taking the lead from Congress' broad language, however, courts have acknowledged that such investigations, where necessary to maintain the integrity of the tax enforcement authorities,

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disclose returns and return information to Treasury Department employees for their use in an "administrative action or proceeding affecting the personnel rights" of an employee or former employee, see §6103(l)(4)(B),(A)(I), and argued that, in addition, the challenged disclosures were made pursuant to a good faith interpretation of §6103. **The district court granted the motion to dismiss the complaint under Rule 12(b) without indicating which provision applied to which disclosures.** In view of our disposition, we do not address these subjects.

[12] **Note Added:** Gardner's supervisors and not the IRS conducted the investigation

are "tax administration" matters. Thus, in *Rueckert v. IRS*, 775 F.2d 208 (7th Cir. 1985), the Seventh Circuit held that the tax returns of a state employee responsible for investigation of tax fraud were **properly disclosed to persons within the state tax department**[13] who were investigating whether the employee had engaged in a unauthorized outside employment.*[emphasis added] Id.* at 212. Relying on the "tax administration" exception of §6104(h)(1), the Seventh Circuit interpreted "the management' and 'supervision' of a state' internal revenue laws [to] include [] ensuring that its employees are free from conflicts of interest that could undermine the integrity of its system of administering the state tax laws." *Id.* Similarly, the Fifth Circuit recently held the "tax administration" exception of §6103(h)(4) applicable to tax information disclosures made with regard to an IRS employee's Title VII and Merit System Protection Board challenges to the termination of his employment for noncompliance with the tax laws. *Hobbs v. United* 209 F.3d 408 (5th Cir. 2000).[14] The *Hobbs* Court observed that the IRS employee's "own compliance with the federal tax laws was something of key concern to the IRS; his position required him to examine the accuracy of corporate and individual tax returns and, in turn, to have a sophisticated understanding of the tax laws," and concluded that disclosures made in the context of administrative and judicial challenges to his termination "unquestionably encompassed

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[13] **Note Added**: This employee investigation was conducted by the Inspector General' Office and his tax return was never disclosed the employee's supervisor. *Id 210.*

[14] **Note Added**. The Inspection Division conducted an investigation on Mr. Hobbs.

tax administration". *Cf. United States v.Mangan,* 575 F.2d 32, 40 (2d Cir. 1978). Given this reasonable construction of the broad language of §6103(h)(1) and (4), it would seem that the disclosures of which Mr. Gardner complains were proper for purposes of enabling the IRS to conduct its internal investigation of his tax history[15], and to explain the basis for the termination of his employment in the subsequent administrative proceedings.

Mr. Gardner contends, however, that our decision in *NTEU* not only bars the wholesale disclosures that he alleges occurred here, but hold that the "tax administration" exception of §6103(h)(1) is inapplicable to personnel matters, and thus to his case. Although there is some broad language in *NTEU* suggesting Mr. Gardner's point, properly read in context *NTEU* does not demonstrate error by the district court. To the extent that *NTEU* concluded that an employee grievance unrelated to the employee's tax compliance history could entail disclosure only upon proper authorization under §6103(l)(4)(A) and thus implicitly concluded that the grievance was not a "tax administration" matter justifying §6103(h)(1) disclosure, *NTEU* is not dispositive of whether the IRS may, as a matter of tax administration, disclose an employee's tax records to IRS officials as part of an internal investigation of the employee's compliance with the tax laws, or in subsequent proceedings relating to a resulting termination decision.

In *NTEU*, the court held that disclosures by two IRS employees of confidential taxpayer information in the course

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[15] **Note added:** If the investigation is conducted by the impartial Inspector General's Office, I concur.

of preparing for a grievance proceeding against the IRS violated the Internal Revenue Codes' non-disclosure requirement. 791 F.2d at 184. The employees had disclosed to each other and to their union attorneys their "Revenue Officer Dailies" while challenging a negative performance evaluation of one of the employees. The unredacted dailies showed how each revenue officer spent his time and included the name of each taxpayer for whose case the officer was responsible, and a description of any action taken. *Id.* at 185. The court, recognizing that for a union to fulfill its duty to represent federal employees, it must have access to agency records for bargaining and grievance resolution purposes, concluded that §6103(l)(4)(A) provided for such access.[3] *Id* at 184. Pursuant to that provision, IRS had authorized certain upper level officers to act on the Treasury Secretary's behalf in approving disclosures.[5] The problem in *NTEU* was that

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[3] Section 6103(l)(4) provides:
The Secretary may disclose returns and return information-
(A) upon written request-

(I) to an employee or former employee of the Department of the Treasury, or to the duly authorized legal representative of such employee or former employee, who is or may be a party to any administrative action or proceeding affecting the personnel rights of such employee or former employee; or

(ii) to any person, or to the duly authorized legal representative of such person, who rights are or may be affected by an administrative action or proceeding under section 330 of title 31, United States code...

[5] In *NTEU* the court relied on IRS Delegation Order 184-85 (rev.2, para.1(e)(Mar.21,1982), which set forth the authorization procedure under §6103(4)(A) and **allowed only certain upper level officers to act as the Secretary designees in**

the **employees had not obtained such authorization, and consequently, the court held, the disclosures violated §6103.** *Id.* at 184-85, 187 [emphasis added]. The court never addressed the scope of the "tax administration" exception under §6103, although it was implicit that the court did not consider the employee grievance to involve "tax administration," given its reliance on the authorization procedures of §6103(l)(4)(A), and its acknowledgment that such procedures would not be necessary for disclosures made pursuant to "tax administration" matters under §6103(h)(1). *Id* at 188. Thus, while the court stated broadly that ***"disclosures for personnel purposes, whether to employees or outsiders, are prohibited by statute unless authorized in the precise manner indicated in §6103(l)(4)(A)"***, *Id. [emphasis added]*, this statement was not made with regard to the scope of the "tax administration exception" under §6104(h)(1) or (h)(4), but merely reiterated the court's conclusion that the type of disclosures at issue could not be made under §6103(l)(4)(A) absent proper authorization. *Id* at 184-85, 187.

Moreover, the court's implicit holding that the grievance proceeding at issue did not constitute "tax administration" has no bearing on the instant case. The disclosures in *NTEU* occurred in the course of an employee grievance proceeding against the IRS relating to the quality and quantity of the employee's work performance. As an adversarial personnel matter, it did not implicate the IRS' need to guard the integrity of its operations. By contrast, the disclosures that Mr. Gardner challenges, as in *Ruekert* and *Hobbs*, occurred in

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granting permission to disclose tax information.*NTEU*, 791 F.2d at 184-85.[emphasis added].

connection with the IRS' legitimate need to protect the integrity of its tax enforcement operations by ensuring that is employees were in compliance with the tax laws.[16] Because the disclosures of Mr. Gardner's tax records were made for the limited purposes of determining whether he had failed to comply with the tax laws and in justifying the resulting decision to terminate his employment, they were integral to the IRS' need to ensure that its employees' conduct does not "undermine the integrity of [the IRS'] system of administering the ...tax laws."[17] *Rueckert*, 775 F.2d at 212, and thus the disclosures were proper under the "tax administration" exception of §6103(h)(1) and (4). Accordingly, the district court did not err in dismissing Mr. Gardner's disclosures claims under Rule 12(b).

III.

Second, Mr. Gardner contends that the district court erred by dismissing under Rule 12(b)(6) his claims under the Privacy Act, 5 U.S.C §552a. In his complaint, Mr. Gardner raised Privacy Act claims that fall into three primary categories: disclosure of his tax information, expungement or amendment of information in his tax records, and disclosure of non-tax related information. Only the first category merits

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[16] **Noted added**: The Inspector General's Office has the exclusive authority to protect the integrity of the tax administration system.

[17] **Note Added**: The Inspector General's mission is to protect the integrity of the tax administration system, Abreu and Mopsick were required to refer any "suspicion of improperity to the Inspector General to ensure taxpayer/Gardner's rights were protected. See *Ruckert* at 210.

more than summary discussion.[6] As to this category, the district court ruled that any claims regarding the disclosure of tax information are preempted by the Internal Revenue Code. This is a question of first impression for this court.

In dismissing Mr. Gardner's disclosure claims, the district court relied on Lake v. Rubin, 162 F.2d 113 (D.C. Cir. 1998). In Lake, the court held that taxpayers could not rely on the Privacy Act to obtain access to their tax records because the more specific provisions of the Internal Revenue Code. §6103, controlled. Id. at 115-16. While *Lake concerned access by taxpayers to their own records*, the decision is instructive on whether §6103 preempts Privacy Act claims regarding disclosure of taxpayer records by third parties.

Following the approach in Cheek v. IRS, 703 F.2d 271, 271-72 (7th Cir. 1983), the court in Lake noted with approval the conclusion of the Seventh Circuit that §6103 "overrides any inconsistent provisions ... the Privacy Act'. Lake, 162

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[6] In view of the plain language of the Internal Revenue Code, the district court correctly ruled that 26 U.S.C.§7852(e) stripped the court of subject matter jurisdiction over Mr. Gardner's Privacy Act claims for expungement or amendment of tax records 26 U.S.C.§7852(e) (1994). *See also, e.g. England v. Commissioner, 798 F.2d 350, 351-52 (9th Cir. 1986)*. Similarly, the district court correctly ruled that the alleged disclosures of non-tax information, including "defamatory statements" made in state and federal administrative proceedings by IRS officials and intra-Treasury/IRS disclosures of Mr. Gardner's wage records, constitute "routine uses" exempt from Privacy Act protection. See 5 U.S.C. §552a(b)(3); 57 Fed.Reg. 139000, 14058-59 (1992). Cf. *Department of the Air Force v. Federal Labor Relations Authority,* 104, F.3d 1396, 1401-02 (D.C. Cir. 1997).

F.3d at 116. That conclusion, the court observed, was supported by the legislative history, in view of the Senate Report's statement "that [tax information] should generally be treated as confidential...except in those limited situations delineated in... section 6103..." Id. At 116, n.3 (citing S. Rep. No 94-938 at 318 (1976)). In addition, the Lake court viewed the conclusion of exclusivity to be analogous to its precedent that the Freedom of Information Act does not govern the disclosure of information when another statute more specifically addresses the disclosure of that information through "'comprehensive, carefully tailored and detailed' provisions 'designed to protect both the interest of ' those seeking the information and the interest in 'confidentiality.'" Id. At 116 (citing Ricchio v. Kline, 773 F.2d 1389, 1395 (D.C. Cir. 1985)). That precedent is even more directly analogous to the instant case than it was to Lake, because concerns the peremption of statutory provisions regarding disclosure to third parties by other, more specific provisions.

From the analysis in Lake, the district court could properly conclude with regard to Mr. Gardner's unauthorized disclosures claims that §6103, with its detailed framework for access to and disclosure of tax records, preempts the relatively generic provisions of the Privacy Act. The Fifth Circuit, citing Lake and Cheek, likewise concluded that §6103 trumps Privacy Act claims for unauthorized disclosures where the disclosures fall within §6103' "tax administration" exception. Although declining to opine on whether preemption would exist absent a direct conflict between the Internal Revenue Code and the Privacy Act, the Fifth Circuit concluded that such a conflict did exist, and that the former thus trumped the latter, where a disclosure that related to "tax administration" (and thus was exempt from the Internal Revenue Code's nondisclosure restriction) was

the basis for a claim under the Privacy Act.[7] The Fifth Circuit also cited Cheek and Lake for the broader proposition that the majority of courts to confront the issue have concluded that the Internal Revenue Code preempts the Privacy Act in "providing[19] the exclusive remedy for disclosures of tax return information." Hobbs, 209 F.3d at 411. Those circuit courts of appeals allowing Privacy Act claims based on tax return disclosures neither addressed §6103 preemption directly nor faced a situation in which the Privacy Act provided a remedy for conduct permissible under the Internal Revenue Code. *See Taylor v. United States,* 106 F.3d 833, 836-37 (8th cir. 1997); *Long v. IRS*, 891 F.2d 222, 224 (9th Cir. 1989).

Because our analysis in Lake, supported by decisions in the Fifth and Seventh Circuits, leads inexorably to the conclusion that the Internal Revenue Code preempts the Privacy Act for remedies for disclosure of tax information, we hold that §6103 is the exclusive remedy for a taxpayer claiming unlawful disclosure of his or her tax returns and tax information. The district court, therefore, did not err in dismissing under Rule 12(b)(6) Mr. Gardner's Privacy Act claims based on IRS disclosures of his tax returns and tax information."

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[7] In *Hobbs*, the Fifth Circuit cited *Sinicki v. United States Department of the Treasury,* No 97 C.V. 0901, 1998 WL 80188 (S.D.N.Y. Feb 24, 1998), in which the district court had ruled that " '[s]ection 6103 should only implicitly repeal the Privacy Act to the extent it presents an irreconcilable conflict.'" *Hobbs*, 209 F.3d at 412 (quoting *Sinicki*, 1998 WL 80188, at*5).

[19] **Note added:** The majority of courts have recognize separate claims exists under IRC 6103(a) and 5 U.S.C. 552a(b).

Accordingly, we affirm the judgment of the district court.

United States Court of Appeals
For The District of Columbia Circuit

No 99-5089 **September Term, 1998**
96cv01467

Bruce E. Gardner,
Appellant,

v.

United States of America, et al.,
Appellees

United States Court of Appeals
For District of Columbia Circuit
Filed
Aug 4, 1999
CLERK

BEFORE: Wald, Ginsburg, and Garland, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance of the claims involving the Merit Systems Protection Board (Counts-A, I-B, and IV-A), the response thereto, and the lodged reply; and the motion for leave to file the lodged reply and the opposition thereto, it is

ORDERED that the motion for leave to file be granted. The Clerk is directed to file the lodged reply. It is

FURTHER ORDERED that the motion for summary affirmance be granted and that the district court's dismissal of counts I-A, I-B, and IV-A be summarily affirmed. The merits of the parties' position are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C.Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (Per

curiam), cert. denied, 449 U.S. 1994 (1980).–As to Counts I-A and
I-B, the government correctly certified that the employees of the Merit Systems Protection Board ("MSPB) named as defendants were acting within the scope of their employment when they wrote an official agency decision, and therefore Gardner's tort claims can only be brought against the United States under the Federal Tort Claims Act ("FTCA"). See 28 U.S.C.§ 2679(b); Simpkins v. District of Columbia gov't, 108 F.3d 366, 370 (D.C.Cir. 1997). Because the FTCA does not waive the United States' sovereign immunity for claims based on libel or slander, appellant's claims were not cognizable under the FTCA. See 28 U.S.C. § 2680(h). Nor do appellant's claims state a constitutional violation. See Simpkins, 108 F.3d at 372. In addition, the district court properly dismissed Count IV-A. **To the extent appellant sought damages under the Privacy Act, the MSPB did not act in a manner that was intentional or willful.** [emphasis added] See 5 U.S.C.§ 552a(g)(4); Deters v. United States Parole Comm'n, 85 F.3d 655 (D.C. Cir. 1996). **To the extent appellant sought the amendment of records, he failed to exhaust his administrative remedies, a prerequisite to filing a complaint in district court.** [emphasis added]. See Dickson v. OPM, 828 F.2d 32, 40 (D.C.Cir. 1987). Nor did appellant state a claim for a violation of 5 U.S.C.§ 552a(e)(7). See Nagel v. U.S. Dep't of Health, Educ. & Welfare, 725 F.2d 1438, 1441 (D.C..Cir. 1984). Because **the district court correctly dismissed these three counts on the merits,**[emphasis added]. it is not necessary to consider whether dismissal was also appropriate because of appellant's failure to appear at the motions hearing.

The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam **Initialed, Initialed, Initialed**

United States Court of Appeals
For The District of Columbia Circuit

No 98-5498 **September Term, 1998**
96cv01467

Bruce E. Gardner,
Appellant,

v.

United States of America, et al.,
Appellees

United States Court of Appeals
For District of Columbia Circuit
Filed
FEB 3, 1999
CLERK

BEFORE: Wald, Randolph, and Garland, Circuit Judges

Upon consideration of the court's order to show cause filed October 27, 1988, and the response thereto,it is

ORDERED that the order to show cause be discharged, It is

FURTHER ORDERED that the appeal be dismissed for lack of jurisdiction. Appellant seeks review of the district court's September 18, 1998, order denying his motions for summary judgment, default judgment, and a ruling that the averments set forth in appellant's complaint are admitted. Because the district court's order is interlocutory and does not satisfy the requirements of the "collateral order doctrine," see Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69 (1978); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1948); Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1025 (D.C. Cir. 1997); this court is without jurisdiction to review the challenged order. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has failed to demonstrate how the remedy afforded by direct appeal will be clearly inadequate to correct the perceived wrong, see United States v. Poindexter, 859 F.2d 216, 222 (D.C.Cir. 1988) (per curiam), cert. denied, 490 U.S. 1004 (1989); thus, he has not shown a clear and indisputable right to the extraordinary remedy of mandamus, see Gulfstream Aerospace Corp. V. Mayacamas, 485 U.S. 271, 289 (1988).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See D.C. Cir. Rule 41.

Per Curiam Initialed, Initialed, Initialed

[Mandated Issued 4/31/99]

EXCERPT FROM DECISION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER, Plaintiff,	)	
	)	Civil Action No. 96-1467
v.	)	(EGS)
	)	
UNITED STATES, et al;., Defendants.	)	**FILED**
	)	**JAN 29 1999**
	)	Nancy Mayer-\Whittington. Clerk
	)	U.S. DISTRICT COURT

MEMORANDUM OPINION & ORDER

EMMET G. SULLIVAN, UNITED STATES DISTRICT JUDGE.

INTRODUCTION

On January 21, 1999, plaintiff filed a motion to continue the motions hearing that was scheduled for January 27, 1999. In his motion and during a telephone conference with opposing counsel on January 22, 1999, plaintiff communicated to the "Court that he was suffering from the flu and had slightly burned his hands while extinguishing a fire. The Court denied plaintiff's motion during the telephone conference, but only after considering that several of the defense counsel reside in the State of California and had incurred substantial costs in traveling to Washington, D. C for the hearing and after determining that plaintiff seemed healthy enough to appear in court.

During the telephone conference, the Court noted that plaintiff's injuries did not require him to seek the medical services of a doctor or travel to a hospital. Plaintiff did not sound congested or wheezy and, in the view of the Court, was not unclear in his thoughts. In an effort to accommodate plaintiff, the Court told plaintiff that he could remain seated during the arguments and that adequate water would be provided for him at counsel table. At that time, plaintiff indicated he would be present in court. Thereafter, the Court decided to issue an oral ruling on pending motions and dispense with argument.

When plaintiff failed to appear for argument on January 27, 1999, the Court stated that it would issue written rulings on all motions and that, in addition to other reasons for dismissal plaintiff's complaint would be dismissed pursuant to Fed.R.Civ. P. 41(b) for failure to prosecute. Later that evening, plaintiff telephoned the Court and stated that he was on medication that caused him to oversleep and miss the motions hearing. Despite plaintiff's contact with the Court, the Court dismissed the case pursuant to Rule 41(b) as well as for the reasons set forth below.[1]

FACTUAL BACKGROUND

Plaintiff filed this complaint on June 25, 1996, which brings claims against the United States, the Department of the Treasury, the Internal Revenue Service ("IRS") and ten of its current or former employers, the State of California and one of its agencies, and the Merit Systems Protection Board

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[1] **Plaintiff's note**-The court was presented with a doctor's note on January 28, 1999 with a motion to reset the hearing date. The court rejected the motion and doctor's note from the record by returning them to plaintiff.

and two of its judges. Plaintiff seeks relief under various legal theories, including constitutional violations, violations of the Privacy Act, violations of 26 U.S.C.§ 6103, which governs the confidentiality of tax returns and "return information," Texas defamation law, and the Whistleblowers' Protection Act.

Plaintiff's complaint stems from the termination of his employment as a tax attorney for the IRS. The IRS claims that it fired plaintiff's because of the number of unsupportable positions taken by him on his federal tax returns, his failure to file Maryland to Maryland income tax returns[2], and his failure to comply with California motor vehicle laws[3]. Throughout the process of determining whether grounds existed for terminating plaintiff's employment and of defending the IRS' position with regard to plaintiff's request for unemployment benefits, the IRS had access to and disclosed plaintiff's's tax return information. The gravamen of plaintiff's complaint is that the disclosures violated various laws.

DISCUSSION

I. Legal Standard

Defendants have filed motions to dismiss all of plaintiff's claims pursuant to Fed.R.Civ.P. 12(b)(1), 12(b)(2), and 12(b)(6). A motion under 12(b)(1) "presents a threshold challenge to the court's jurisdiction." Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987). In ruling on a motion to

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[2]**Plaintiff's note**-No support for this erroneous statement is contained in the record nor was it ever alleged by the IRS.

[3]**Plaintiff's note**- the court excluded the correct phrase "timely comply" from its statement.

dismiss for lack of standing pursuant to Fed. R. Civ.P 12(b)(1), the Court must accepted the allegations contained in the complaint as true, see, e.g., Gibbs v. Buck, 307 U.S. 66 (1939); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977), and must construe the complaint in favor of the complaining party. See Warth v. Seldin, 422 U.S. 490, 501 (1975); Haase, 835 F.2d at 906 (quoting Warth).

Several defendants have moved for dismissal pursuant to Fed.R. Civ. P. 12(b)(2) for lack of personal jurisdiction. In order for this Court to maintain personal jurisdiction over a non-resident defendant, jurisdiction must be proper under the District of Columbia long- arm statute and consistent with the demands of due process. See United States v. Ferrara, 54 F.3d 825, 828 (D.C. Cir. 1995): Crane v. Carr, 814 F.2d 758, 762 (D.C.Cir. 1987). The burden is on the plaintiff to establish that this Court has personal jurisdiction over defendants and allege specific facts upon which personal jurisdiction may be based. See Blumenthal v. Drudge, 992 F. Supp. 44, 53 (D.C.C. 1998).

Finally, under Fed.R.Civ.P. 12(b)(6), a motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45 (1957). "Because a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." Marshall Co. Health Care Auth.v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993); cf. Neitzke v. Williams., 490 U.S. 319, 327 (1989) (noting that a party may lose on a 12(b)(6) motion whether his claim "is based on an outlandish legal theory or a close but ultimately unavailing

one"). The court must also construe the complaint in favor of the complaining party. See Warth, 422 U.S. at 501.

II. Motion to Dismiss by Defendants United States, Department of Treasury, and Internal Revenue Service.

A. Motion to Dismiss Counts 2, 16, 22, 23, 25, 27, 29, 30, 36, & 39.

Defendants move to dismiss Counts 2, 16, 22, 23, 25, 27, 29, 30, 36, & 39, which are alleged constitutional violations by the individual IRS defendants. The government and its agencies have sovereign immunity unless there has been an express waiver. See United States' v. Sherwood, 312 U.S. 584, 586 (1941). Because there has been no such waiver, the United States, the Department of Treasury, and the IRS are immune from suit for money damages on constitutional claims. Plaintiff brings Bivens[1] claims against the individual IRS defendants, and thus the United States, the Department of Treasury, and the IRS are not proper defendants. Therefore, defendants' motion to dismiss Counts 2, 16, 22, 23, 25, 27, 29, 30, 36, & 39 pursuant to Fed. Civ.. P. 12(b)(6) is GRANTED.

B. Motion to Dismiss Counts 5, 11, 35, 38, 41 & 44

Defendants move to dismiss Counts 5, 11, 35, 38, 41 & 44,[2] which are alleged violations of 26 U.S.C.§6103,[3] the

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[1] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), created a remedy for persons deprived of their constitutional rights by federal employees.

[2]The government also argues that a "plaintiff pleading a claim under §6103 must meet a heightened pleading requirement

to enable the United States to determine what conduct allegedly violated §6103, whether any exceptions apply, and whether the disclosures were made pursuant to a good faith interpretation of §6103." Memorandum of Law in Support on Motion to Dismiss Defendants United States of America, Department of the Treasury, and Internal Revenue Service, at 19. The government goes on to argue that a "plaintiff has stated claims for violations of §6103 ONLY if he has pleaded and can prove that the disclosures were neither authorized nor made pursuant to a good faith, but erroneous, interpretation of §6103." Id. Although the government ultimately sufficiently pleads that it made the disclosures pursuant to a good faith interpretation of §6103, the government is incorrect in placing the burden of proof on the plaintiff. The government cites Flippo v. United States, C.A. No. ST-C-86-145 (W.D.N.C. May 14, 1987), aff'd 849 F.2d 604 (4th Cir. 1988), for the proposition that the burden lies with the plaintiff.

Numerous courts have addressed this identical issue and concluded that the burden of proof lies with the government. See, e.g., McDonald v. United States, 102 F.3d 1009, 1011 (9th Cir. 1996) ("[T}he plaintiff is not in a position at the pleading stage to demonstrate the basis for an agent's actions."); Jones v. United States, 97 F.3d 1121, 1124 (8th Cir. 1996) ("The burden of pleading and proving good faith under section 7431 rests with the government, not the complaining party."); Sinicki v. United States Dept. Of Treasury, No. 97-901, 1998 WL 80188 (S.D.N.Y. Feb. 24, 1998) (noting that the good faith defense under Section 7431 is analogous to that in Harlow v. Fitzgeral, 457 U.S. 800 (1982), which is an affirmative defense).

[3]Section 7431 provides for civil damages for violations of section 6103. Title 26 U.S.C. §6103(a) states that "[r]eturns and return information shall be confidential, and except as authorized by this title-(1) no officer or employee of the United States, (2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program

provision that governs the confidentiality of tax returns and "return information." a claim of wrongful disclosure under §6103 requires that the IRS disclosed confidential tax return information either knowingly or negligently and that this disclosure was not authorized by §6103 of the Internal Revenue code. Recovery will be denied, however, if the IRS acted on a "good faith but erroneous interpretation" of §6103. See 26 U.S.C. §7431(b) (1998).

The government contends that the disclosure of plaintiff's tax return was authorized by §6103(h)(1), which provides that "[r]eturns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such disclosure for tax administration purposes." The government also maintains

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listed in subsection (1)(7)(D) who has or had access to returns or return information under this section, and
(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6), (12), or (16) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of the subsection, the term "officer or employee" includes a former officer or employee."

Title 26 U.S.C.§7431(a)(10) states that "[i]f any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States."

that §6103(l)(4)(B) authorizes the IRS to disclose returns and return information to Treasury Department employees for their use in an "administrative action or proceeding affecting the personnel rights" of an employee or former employee. Finally, the government argues that the disclosures wee made pursuant to a good faith interpretation of §6103. **Because all of the government's contentions are correct,** their motion to pursuant to Fed.R.Civ.P. 12(b)(6) is GRANTED. [emphasis added.].

C. Motion to Dismiss Counts 2, 3, 4, 19, 33, 34, & 43

Defendants move to dismiss Counts 2, 3, 4, 19, 33, 34 & 43, which allege violations of the Privacy Act, 5 U.S.C. §552a.[4] The defendants argue that plaintiff cannot bring an

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[4]The Privacy Act, 5 U.S.C. §552a, provides the framework by which the federal government maintains and disseminates information about individuals. Under the Privacy Act, each agency that maintains a system of records must provide an individual with "access to his record or to any information pertaining to him which is contained in the system." 5 U.S.C. §552a(d)(1) (1998). An individual also has the right to request amendment of a record that he or she believes is incorrect, and the statute specifies certain procedural protections that an agency must observe before denying an individual's request to amend his or her record.see 5 U.S.C.§552a(d)(2),(3) and (4) (1998). The Privacy Act also requires agencies to promulgate regulations establishing the procedures by which individuals can gain access to and seek to amend the records kept by the agency. See 5 U.S.C.§552a(f) (1998). Finally, the Privacy Act provides civil remedies for violations of the Privacy Act and provides for federal jurisdiction over such suits. See 5 U.S.C.§552a(g)(1998). Depending on the violation, a prevailing plaintiff in a Privacy Act suit may obtain injunctive relief, attorneys' fees and, if the government intentionally or willfully violates certain provisions of

action under the Privacy Act because §6013 is the exclusive remedy for alleged wrongful disclosures of returns and return information. The government cites Cheek v. IRS, 703 F.2d 271 (7th Cir. 1983), for the proposition that relief under the Privacy Act is not possible for actions that should be brought under §7431. a more recent New York case, Sinicki v. United States Department of Treasury,, No. 97 C.V.. 0901, 1998 WL 80188 (S.D.N.Y. Feb 24, 1998), discusses the applicability of the Privacy Act to IRS disclosures of tax return information and whether Sections 6103 and 7431 provide for either an express or implicit repeal of the Privacy Act as it applies to tax return information.

Sinicki highlights the split among the circuits as to the applicability of the Privacy Act. The court noted that "[v]ery few courts have ruled on whether Section 6103 proves the exclusive remedy for disclosures of tax return information [emphasis added].. The Seventh Circuit has squarely held that it does, with little discussion. Cheek v. IRS, 703 F.2d 271 (7th Cir. 1983). Other courts, have applied the Privacy Act to tax return disclosures without addressing whether Section 6103 preempts it. Taylor v. United States,, 106 F.3d 833 (8th Cir. 1997); Long v. IRS, 891 F.2d 222 (9th Cir. 1989); S.R. Mercantile Corp v. Maloney, 909 F.2d 79, 81 (2d Cir. 1990) (noting that district court applied Privacy Act)." Scenic, at 3. The court then concluded that "[a]lthough there are arguments on both sides, the language, structure, purpose and legislative history of Section 6103 do not make manifest and clear a legislative intent to repeal the Privacy Act as it applies to tax return information." Id.

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the Privacy Act, damages. Id.

The court in Sinicki distinguished its facts from the facts in Cheek v. IRS, and King v. IRS, 688 F.2d 488 (7th Cir. 1982), upon which Cheek is based. In *King*, the plaintiff had requested internal IRS data and memos through the Freedom of Information Act, and the court was considering two provisions that were in direct conflict, a fact which does not exist here. In Scenic, the court stated that the "privacy Act, unlike FOIA, does not conflict with Section 6103. ... Thus, the Cheek court's reliance on King seems misplaced, because under Posadas[5] and Germain[6] **Section 6103 should only implicitly repeal the Privacy Act to the extent it presents an irreconcilable conflict.**" 1998 WL 80188, at * 5.[emphasis added]. Additionally, the plaintiff in Sinicki was an employee of the IRS and claimed that the IRS breached a legal wall by placing her tax records within her personnel file.

On December 8, 1998, this Court directed both the United States and the plaintiff to address the significance of Sinicki. Plaintiff stated that Sinicki authorizes plaintiff to bring his claim under either §6103 or the Privacy Act. Defendant argues that the Court should look to the recent decision by the Court of Appeals for the D.C. Circuit in Lake v. Rubin, No 98-5009, 1998 WL 852538 (D.C. Cir. Dec. 11, 1998), and not to Sinicki, for guidance on the applicability of the Privacy Act to wrongful disclosures of tax return information. Indeed, Lake is controlling on this Court and eals with similar issues.

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[5] Posadas v. National City Bank, 296 U.S 497 (1936).

[6] Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992).

Lake involved consolidated appeals from district court judgments dismissing 138 complaints, which, though filed by different individuals, contained the same cause of action. The plaintiffs in Lake sought to obtain access to tax return information under the Privacy Act, instead of §6103 of the Internal Revenue Code. The district court dismissed their case for lack of jurisdiction, holding that 26 U.S.C.§ 7852(e) deprived district courts of jurisdiction over claims that the IRS had violated the Privacy Act. The Court of Appeals affirmed, but on different grounds.

The court in Lake favorably discussed the Seventh Circuit's holding in Cheek, the Senate report accompanying the 1976 revision on § 6103, as well as other considerations, which indicate that **" §6103, although not framed as an exception to the Privacy Act, overrides any inconsistent provisions of prior statutes, including the Privacy Act, and represents the exclusive statutory route for taxpayers to gain access to their return information."** Id at 115. The court then stated that Congress most likely intended "§6103 to be the exclusive means by which individual may obtain tax records relating to them." Id. at 116.

The instant litigation differs from Cheek and Lake and is more similar to disclosure of information and not to obtain disclosure of information. [emphasis] The Lake court hinted that this distinction may be one without a difference. The court stated that "[i]n analogous circumstances, we have held that the Freedom of Information Act does not govern the disclosure of information when, in another statute, Congress has dealt with disclosure of the same information through 'comprehensive, carefully tailored and detailed' provisions 'designed to protect both the interest

of' those seeking the information and the interest in ' confidentiality.'" Id. (emphasis added) (citation omitted).

Here, plaintiff seeks to maintain the confidentiality of his tax return information. Insofar as §6103 of the Internal Revenue Code deals with both the disclosure of tax return information and the confidentiality of that same information, the more detailed provisions of §6103 would apply over the general provisions of the Privacy Act. In fact, the court in Lake concluded the same, stating that "we believe that the specific provisions of §6103 rather than the general provisions of the Privacy Act govern the disclosure of the sort of tax information requested here." Id. Although the Court ultimately held that "individuals seeking 'return information' ..., must do so pursuant to §6103 of the Internal Revenue Code, rather than the Privacy Act," the fact that §6103 deals with both those seeking "return information" and those seeking to prevent the disclosure of return , coupled with the Lake court's favorable reading of Cheek, indicates that §6103 is the exclusive remedy for alleged wrongful disclosures of returns and return information. Moreover, given the dual purpose of §6103, it is highly unlikely that the court would allow §6103 to be the exclusive remedy for those seeking information but not for those seeking to prevent the disclosure of such information. In light of this reasoning, defendants' motion to dismiss Counts 2, 3, 4, 19, 33, 34, & 43 pursuant to Fed.R.Civ. P. 12(b) is GRANTED.

D. Motion to Dismiss Counts 9, 20, 24, & 42

Defendants move to dismiss Counts 9, 20, 24, & 42, which seek to compel the IRS and the Treasury Department to amend and/or expunge certain information about plaintiff from its tax records. Defendants argue that plaintiff's claims to amend these records are barred by 26 U.S.C.§7852(e). In

Maxwell v. Rubin, 2 F.Supp. 2d 45, 49 (D.D.C.1998), the court stated that

> [t]he IRS... has been exempted from 5 U.S.C. §552a(g), the section of the Privacy Act that provides a civil remedy for any violations of the Privacy Act and vests the federal courts with jurisdiction over such suits. See 26 U.S.C.§7852(e) (1998).

The federal courts therefore lacked jurisdiction over suits to enforce the Privacy Act against the Internal Revenue Service in cases in which plaintiff seeks to obtain records which relate "directly or indirectly, to the determination or the existence of possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest, find, forfeiture, or other imposition or offense." 26 U.S.C. §7852(e) (1998); see O'Connor v. United States,, 669 F.Supp. 317, 323 (D. Nev. 1987), aff'd, 935 F.2d 275, 1991 WL 99478 (9th Cir. 1991).

The court in Maxwell also noted that the "IRS is exempt from the amendment provisions of the Privacy Act, 5 U.S.C.§552a(d)(2),(3) and (4), "3 F.Supp. 2d at 48, which give an individual the "right to request amendment of a record that he or she believes is incorrect, and the statute specifies certain procedural protections that an agency must observe before denying an individual's require to amend his or her record." Id. at 46. **Because the IRS is exempt from this provision of the Privacy Act,** defendants' motion to dismiss Counts 9, 20, 24 & 42 pursuant to Fed.R.Civ..P.12 (b)(1) is GRANTED. **[Note Added: See A51,A57,A62-65,A66]**

E. Motion to Dismiss Counts 8 & 37

Defendants move to dismiss Counts 8 & 37, which involve alleged privacy right violations by the Department of Treasury and the IRS. Defendants argue that the Privacy Act, 5 U.S.C.§552a(b), which prohibits agencies from disclosing information contained in "systems of records," without the written consent of the person to whom the records relate, contains an exception for "routine use." "Routine use" is defined as "the use of such record for a purpose which is compatible with the purpose for which it was collected." **The government correctly points out** that although"the Privacy Act mandates that each employee receive actual notice of the routine uses to which private information provided by the employee is put," U.S. Postal Serv. v. National Ass'n of Letter Carriers, 9 F.3d 138, 146 (D.C. Cir. 1993), the information in the instant case was not gathered from Plaintiff, but from third parties. Moreover, IRS disclosure of information contained in personnel records for the purposes of (1) determining whether to fire or discipline the plaintiff, (2) defending against the plaintiff's challenge to his dismissal, and (3) denying the plaintiff's claims for unemployment compensation stemming from his federal employment, are all routine uses authorized by the Department of Treasury. Therefore, defendants' motion to dismiss Counts 8 & 37 pursuant to Fed. R.Civ. P. 12(b)(6) is GRANTED

.F. Motion to Dismiss Count 17

Defendants also move to dismiss Count 17, which is a claim against the United States under Texas defamation law. This claim must be dismissed for three reasons: (1) The Federal Tort Claims Act ("FTCA".) Expressly prohibits suits for libel or slander, see 28 U.S.C. §2680(c)(1998); (2) the FTCA prohibits suits against the United States for "any claim arising in respect of the assessment or collection of any

tax..." 28 U.S.C. §2680© (1998); and (3) the FTC states that no tort action may be filed against the United States "unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency in writing..." 28 U.S.C. §2675 (1998). Count 17 concerns defamation, which is a prohibited claim under the FTCA; concerns tax collection which is a prohibited claim under the FTCA; and has not been presented to the IRS or Department of Treasury for adjudication. See Memorandum of Law in Support of Motion to Dismiss Defendants United States of America, Department of the Treasury, and Internal Revenue Service, at 41. Therefore, defendants' motion to dismiss Count 17 pursuant to Fed.R.Civ. P. 12(b)(1) and 12(b)(6) is GRANTED.

G. Motion to Dismiss Count 26

Defendants also move to dismiss Count 26, in which plaintiff asserts that he is entitled to relief under the Family and Medical Leave Act ("FMLA").... **Note Added-** Plaintiff withdrew Count 26 prior to the court's decision but the court elected to rule on it anyway.

H. Motion to Dismiss Count 31.

Defendants also move to dismiss Count 31, which directs the Department of Treasury to reinstate plaintiff to his position as an IRS District Counsel attorney and receive back pay pursuant to the Whistleblowers' Act[7], until a final decision is reached on his challenge to his firing.... **Note Added-** Plaintiff withdrew Count 31 prior to the court's decision but the court elected to rule on it anyway.]

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[7] Footnote omitted .

II. Motion to Dismiss by State of California

Defendants State of California and California Franchise Tax Board ("CFTB") move to dismiss Counts 12, 13, 14, & 15, which allege that defendants unlawfully disclosed plaintiff's 1991 and 1992 federal and California tax returns to a federal agency. In addition, plaintiff alleges that defendant CFTB violated the "California Disclosure of Information Act,"[8] Defendants argue that their motion be GRANTED BECAUSE OF (1) lack of subject matter jurisdiction. (2) lack of personal jurisdiction, (3) improper venue, (4) insufficiency of service of process, and (5) failure to state a claim upon which relief can be GRANTED.

A. Eleventh Amendment

The Eleventh Amendment to the United States Constitution basis plaintiff from suing a state or a state agency in federal court. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State." The Eleventh Amendment has also been interpreted as a grant of state immunity against suit in federal court by its own citizens as well as citizens of another state. See

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[8] Cal. Civ. Code §1798.24 et seq. States in pertinent part that , "[n]o agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the disclosure of the information is:
(a) To the individual to whom the information pertains.
(B) With the prior written voluntary consent of the individual to whom the record pertains, but only if such consent has been obtained not more than 30 days before the disclosure, or in the time limit agreed to by the individual in the written consent....

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). A suit against a state agency is also proscribed by the Eleventh Amendment. See Pennhurst State Scholl & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). A state may consent to suit in federal court, but that suit must be unequivocally expressed. See id. At 99. In the instant case, this court lacks subject matter jurisdiction over a lawsuit filed by plaintiff against the State of California and the California Franchise Tax Board since neither has consented to suit in federal court. Therefore, defendants' motion to dismiss Counts 12, 13, 14, & 15 pursuant to Fed.R. C.V.. P. 12(b)(1) is GRANTED.

B. Motion to Dismiss Counts 12, 13, 14, & 15

Defendants also move to dismiss Counts 12, 13, 14, & 15 based on lack of personal jurisdiction over California Franchise Tax Board. International Shoe Co. v. Washington., 326 U.S. 310 (1945), held that states may authorize their courts to exercise personal jurisdiction over nonresidents if the out-of-state defendant has "certain minimum contacts - with (the state) such that the maintenance of the suit does not offends 'traditional notions of fair play and substantial justice." 326 U.S. at 316. Thus, the factors that the court may consider are "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficiency resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985). In the instant case, plaintiff does not establish that the California Franchise Tax Board had the requisite minimum contacts or purposeful availment in order to be sued in federal court in DC. Therefore, defendants' motion to dismiss Counts 12, 13, 14,

& 15 pursuant to Fed.R. Civ.. P. 12(b)(2) is GRANTED for lack of personal jurisdiction.[9]

III. Motion to Dismiss by Defendant Merit Systems Protection Board ("MSPB")

Defendants Merit Systems Protection Board ("MSPB"), Ben L. Erdreich, and Antonio C. Amador, move to dismiss Counts 1.A, 1.B, and 4.A, which are claims for defamation and libel and for violation of various provisions of the Privacy Act. Defendants argue that plaintiff's claims for defamation and libel should be dismissed under the Federal Tort Claims Act and that plaintiff cannot attack an administrative record or decision through a Privacy Act claim.

a. Motion to Dismiss Counts I.A. and I. B.

Title 28 §2679(d)(1) provides that "Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United State district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." Here, the Attorney General has certified that defendants Erdreich and Amador were acting within the scope of their employment [**Note added:** *The Attorney General refused to certify that any of the other individual defendants acted within the scope of their* –

[9]Counts 12-15 could also be dismissed for improper venue pursuant to Fed. R. C.V.. P. 12(b)(3) and improper service pursuant to Fed.R.Civ.P.129b)(5).

employment] See Certification of John Bates, attached to MSPB Defendants' Motion to Dismiss. Therefore, Counts 1.a and 1.B should be dismissed against the individual defendants, and the United States should be substituted. Once the United States is substituted, the Federal Tort Claims Act is invoked, and the FTCA bars all claims sounding in libel and slander and also requires the plaintiff to exhaust his administrative remedies before filing suit. Plaintiff has not properly presented his claims to the MSPB. As a result, defendants' motion to dismiss Counts 1.a and 1.B pursuant to Fed.R.Civ. 12(b)(1) is GRANTED.

B. Motion to Dismiss Count 4.A

In Count 4.A, plaintiff asserts that the MSPB has violated various provision of the Privacy Act and seeks to have the records of the MSPB amended. Defendant argues that plaintiff has not exhaused his administrative remedies and that the United Statesis the only proper party in an action for violation of non-disclosure provisions. "a Privacy Act plaintiff. Must exhaust his or her administrative remedies prior to bringing an amendment suite." Hill v. U.S. air Force., 795 F.2d 1067, 1069 (D.C. Cir. 1986). *Plaintiff has not properly presented his claims to the MSPB for amendment*[4], *and thus Defendant's motion to dismiss is* GRANTED. Moreover, **plaintiff has not meet his burden of proof in demonstrating that MSPB' conduct was "intentional or willful." 5 U.S.C.§552a(g)(4)(1998);** [emphasis added] Waters v. Thornburgh, 888 F.2d 870, 875 (D.C.Cir. 1989).

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[4] Plaintiff Note- Plaintiff exhausted his administrative remedies when the MSPB denied plaintiff's motion to exclude privilege tax documents from its records. MSPB rules deem tax records "privileged communications."

Therefore, defendant's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is GRANTED.

IV. Motion to Dismiss by IRS Defendants

Defendants Neal Abreu, Steven Mopsick, Robert Wilson, Albert Larson III, Dennis Quinn, Frank Stokes, William Reitan, Helen Jamison & Stacie Greaux move to dismiss Counts 6,7, 10, 18, 21, 28, 32, & 40 for lack of personal jurisdiction. Defendants Abreu, Mopsick, Larson & Wilson were all IRS employees in either San Francisco or Sacramento, California. Defendants Quinn, Stokes, Reitan, Jamison & Greaux were all IRS employees in the Houston, Texas area. **Defendants' actions *appear* to be within the scope of their employment with the IRS.** As plaintiff has not established that defendants fall within any provision of the D.C. long-arm statute, D.C. Code Ann. §13-422 (1998),[4] this court does not have personal jurisdiction over the defendants, and the motion to dismiss the complaint against the aforementioned defendants pursuant to Fed.R. C.V..12(b)(2) is GRANTED

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss are GRANTED, and the above-captioned case is DISMISSED WITH PREJUDICE.

1/29/99

-S-
EMMET G. SULLIVAN
United States District Judge

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[4]D.C. Code Ann.§13-422 states that "[a] District of Columbia court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, the District of Columbia as to any claim for relief."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER)
Plaintiff,) Civil Action No.
v.) 96-1467 (EGS)
)
UNITED STATES OF AMERICA,) FILED
et al.) DEC 10 1997
Defendants.) NANCY MAYER-WHITTINGTON,
U.S. District Court

ORDER

On November 25, 1997, this Court denied all pending motions in this case and ordered that dispositive motions be filed by December 23, 1997. The court *sua sponte* orders that pursuant to Fed.R.Civ.P.12(a)(4) the defendants are not required to file their answers until resolution of these dispositive motions.

12/9/97 -S-
DATE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER Plaintiff, v. UNITED STATES OF AMERICA, et al. Defendants.	)	) Civil Action No.) 96-1467 (EGS))) **FILED**) **NOV 26 1997**) NANCY MAYER-WHITTINGTON, U.S. District Court

ORDER

The Court hereby denies all pending motions without prejudice. Parties are directed to file any potentially dispositive motion, not to exceed 25 pages *(including* exhibits, appendices, and attachments), by no later than December 23, 1997. Any oppositions shall not exceed 10 pages (including exhibits, appendices, and attachments) and shall be filed by no later than January 20, 1998.

11/25/97 -S-
DATE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For The District of Columbia Circuit

No. 99-5089 **September Terms, 1999**

Bruce E. Gardner, **96cv01467**
Appellant
v.

United States of America, et al.,
Appellees

BEFORE: Wald, Ginsburg and Gardland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed September 27, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: -s-
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For District of Columbia Circuit
FILED
OCT 26 1999
CLERK

United States Court of Appeals
For The District of Columbia Circuit

No. 99-5089 September Terms, 1999

Bruce E. Gardner, 96cv01467
Appellant

v.

United States of America, et al.,
Appellees

BEFORE: Edwards, Chief Judge; Silverberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: -s-
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FILED
AUG 16 2000
CLERK

UNITED STATES CODE ANNOTATED

U.S. CONSTITUTION, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indicment of a Grandy Jury, except in cases arising in the land or naval forces,or in Militia, when in actual service time of War or public danger; nor shall any person be subject for the office to be twice put in jeopardy of life or limb; nor shall be compellted in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation [emphais added.].

1016

Internal Revenue Manual – Part I- Administration

Public Policy Statement-1-1

Tax matters will be handled in a manner that will promote public confidence.

All tax matters between taxpayers and the Internal Revenue Service are to be resolved within established administrative and judicial channels. Service employees, in handling such matters in their official relations with taxpayers or the public, will conduct themselves in a manner that will promote public confidence in themselves and the Service. *Employees will be impartial* and will not use methods which are threatening or harassing in their dealings with the public.

Taxpayer Privacy Rights

The IRS is fully committed to protecting the privacy rights of all taxpayers. Many of these rights are stated in law. However, the *Service recognizes that compliance with legal requirements alone is not enough.* The components of this ethical relationship are honesty, integrity, fairness, and respect.

Among the most basic of a taxpayer's privacy rights is an expectation that the Service will keep personal and financial information confidential. Taxpayers also have the right to expect that the Service will collect, maintain, use, and *disseminate personally identifiable information and data* only as authorized by law and *as necessary to carry out agency responsibilities.* [emphasis added.]

The Service will safeguard the integrity and availability of taxpayers' personal and financial data and maintain fair information and record keeping practice to ensure equitable treatment of all taxpayers. IRS employees will perform their duties in a manner that *will recognize and enhance* ***individuals' right of privacy*** and will ensure that their activities are consistent with law, regulations, and good administrative practice. In its recordkeeping practices, the Service will respect the individual's exercise of his/her First Amendment rights in accordance with law. [emphasis added.]

As an advocate for privacy rights, the Services takes very seriously its social responsibility to taxpayers to limit and control information usage as well as to protect public and official access. In light of this responsibility, the Service is equally concerned with the ethical treatment of taxpayers as well as their legal and administrative rights. [emphasis added.]

22.9 The Inspector General

(4) The Inspector General may have access to returns and return information under the authority of IRC 6103(h)(1) *when* carrying out responsibilities related to tax administration.

(5) Although IRC 6103(h)(1) does not require a written request, nor are disclosures under IRC 6103(h)(1) subject to IRC 6103(p)(3) accounting, **the Inspector General Act Amendments of 1988** (P.L. 100-504) **specially requires the Inspector General to *provide written notice* of intent to access tax information.**

Chapter 14 Conduct Investigations

14.1 Overview

(1) **Internal Security investigates complaints and allegations against IRS employees.** The results of investigations are submitted to management **without** recommendation as to any action to be taken.

14.2 Internal Security Responsibilities

(1) Internal Security is responsible for conducting investigations of alleged misconduct against IRS employees at the grade 14 level and below.

(2) **The Office of Inspector General, Department of Treasury, is responsible for investigating alleged misconduct by the following IRS employees:**

- Grade 15 and higher level employees
- All Inspection employees
- **Office of Chief Counsel employees (excluding employees of the National Director, Office of Appeal, who are investigated by Internal Security)**

(3) The Inspector General may request that Internal Security investigate employees in the preceding categories. Such investigations may be

conducted independently, or jointly with the Inspector General.

14.3 Complaint Procedure

(1) Transmit complaints or allegations against IRS employee in writing to the Supervisor-in-Charge. If the complaint warrants investigation, initiate a case within 15 calendar days of receipt of the information.

(2) A complaint which is not specific or significant enough to warrant an immediate investigation will be placed in the Miscellaneous Information File (MIF) within 15 days calendar days of its receipt.

(3) Report allegations that are appropriate to the Inspector General (as in text 14.2 of this chapter) in a written format through channels to the Office of Inspector General.

(4) Forward complaints unrelated to Inspection's mission to the appropriate agency via memorandum from the Regional Inspector, Referrals to another agency **must be done properly to avoid violations of disclosure laws or the Privacy Act.** (See Chapter 4 for additional information.).

(5) Refer violations of federal statutes under Internal Security's jurisdiction to the U.S. Attorney for prosecutive opinion. (See Chapter 15 of this Handbook for instructions concerning referral of disclosure violations.).

14.4 Investigative Jurisdiction

(1) The Chief Inspector is responsible for detecting and investigating various violations involving IRS employees (and former employees under certain circumstances).

(2) Internal Security investigates the following violations, among others:

- Charges of a criminal nature such as extortion, acceptance of a bribe, willful theft or destruction of government records, embezzlement of government funds or property and use or sale of controlled substance (drugs)
- Official or moral misconduct which may result in removal or disciplinary action
- Presenting false claims, including submitting false expense vouchers
- Accepting compensation or gratuities for rendering assistance in tax matters, for preparation of tax returns, or in connection with the examination of tax returns.

IRS Internal Revenue Manual – Inspection

Conduct Investigations

(10) 331.1 Purpose

Inspection's purpose in conducting investigations of complaints or allegations against employees of the Internal Revenue Service is to determine all pertinent facts and report fully to management for decision as to whether the employee is suitable for retention in the Service and for necessary action by management to separate or otherwise discipline or clear the employee, as the case may be. Where investigation develops evidence of violation of Federal criminal statues. Inspection has a further and important purpose in developing fully all facts for referral to the Department of Justice for consideration as to criminal prosecution.

(10)331.2 Investigative Jurisdiction

(10)331.21 Inspection

(1) The Chief Inspector has the responsibility for detecting and investigating violations, by Internal Revenue Service employees and in certain instances by former employees, of Federal laws and regulations of the Service. The following matters, among others, are within the investigative jurisdiction of Inspection:

(10) 331.3 Recommendations

Inspection will **not** make recommendation as to the action to be taken.

423.2 Complaints Against Service Officials and Employees of Chief Counsel Officials.

(1) Any complaint, allegation or information of misconduct concerning a Service official or employee may be reported directly to any Inspector. Upon receipt of any such information from any source, except as otherwise prescribed in (3), (4),(5) and (6) below, the Inspector will immediately transmit through channels in writing, or if orally transmitted I will be confirmed in writing, to the appropriate Branch Chief.

(2) Whenever a Regional Inspector makes a determination to initiate an investigation on the basis of a complaint, allegation or information concerning alleged misconduct of a filed appeals employee, the Regional Inspector will notify the Regional Director of Appeals of the fact that an investigation has been initiated.

IRS Internal Revenue Manual

Disclosure of Official Information Handbook

22.4.1 Access by IRS Employees Based On "Need to Know"

(1) *The duties performed by Service employees generally involve tax administration. However,* ***personnel should not have unlimited access to returns and return information.***

(2) Service employees may access returns and return information when there is a **"need to know"** the information for their tax administration duties. *This important in maintaining the confidentiality of information in the custody of the Service.*

(3) ***Before disclosing returns or return information to other Service personnel, employees should satisfy themselves that the recipient has an official tax administration need for the information.*** A supervisor should be consulted if there is doubt that disclosures are proper.

22.6 Access by Employees of the Office of Chief Counsel

(1) The Office Chief Counsel Provides legal advice and services to the Commissioner in the administration and enforcement of the internal revenue laws and related statues, as well as in a non-tax legal matters.

(2) Chief Counsel employees are permitted access to returns and return information in matters referred to that office by the Service or relating to the Services' activities.

(3) Access to returns and return information occurs through Service referrals pursuant to established procedures, or upon oral or written request from the Chief Counsel division or office desiring the information for tax administration.

Note: As with IRS employees, Chief Counsel employees must have a "need to know"

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

March 14, 1997

MEMORANDUM FOR ALL EMPLOYEES

FROM: Margaret Milner Richardson
Commissioner of Internal Revenue

SUBJECT: Unauthorized Access to Tax Information

This is a reminder **that Internal Revenue Service employees are prohibited from accessing information not needed to perform official duties. Unauthorized access to accounts is a fundamental violation of the public trust in the confidentiality of returns and return information,** one of the foundations of sound tax administration and public confidence in that system. **It also violates both privacy and disclosure rules and may result in removal from the Service and criminal prosecution.** [emphasis added.].

What this means is that you may only access accounts assigned to you in order to carryout your duties. There are no exceptions!

For example, you may not access, nor attempt to access, accounts of

- Yourself
- Your family
- Your ex-spouse

- Your friends
- **Other employees**
- Spouses or ex-spouses of other employees
- Family or friends of other employees
- Celebrities

You are prohibited from any casual or random access to tax information or tax return information. Such access is known as browsing. Unauthorized access to accounts, absent mitigating circumstances, is serious misconduct and would normally warrant removal. It is also a violation of 18 USC 1030 (Fraud and related activity in connection with computers), which can result in criminal prosecution.

All unauthorized access to accounts, including browsing, is strictly prohibited and will be reviewed by your head of office personally for determination of appropriate sanctions.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER

Plaintiff Civ. No 1:96CV01467 (EGS)

v.

UNITED STATES, et al.,

Defendants

DECLARATION OF ASSISTANT DISTRICT COUNSEL NEAL O. ABREU.

I, Neal O. Abreu, pursuant to the provisions of 28 U.S.C. 1746, declare as follows:

1. I am Assistant District Counsel with the Northern California District (Sacramento Post of Duty) of the Office Chief Counsel for the Internal Revenue Service. **District Counsel offices are *responsible* for representing the Commissioner of Internal Revenue in litigation docketed in the United States Tax Court and for providing other advisory and legal services to officials of the corresponding District Director's Office of the Internal Revenue Service and Regional Appeals Office.** [emphasis added]. I have been an Assistant District Counsel for nine year.

33. With regard to the ***responsibilities*** of supervisors, the Minimum Standards of Conduct, § 0.735-11, "Supervisors" provides:

It is the ***responsibility*** of each supervisor to:

(a) Know the Standards of Conduct applicable to him or her and the employees under his or her supervision,

(b) Advise the employees under his or her supervision to help them obtain advice on the application of the Standards of Conduct,

(c) Adhere to the Standards of Conduct,

(d) See that employees under his or her supervision know and adhere to them also, and

(e) Take or recommend disciplinary action when appropriate in cases where the employees under his or her supervision violate the Standards or the principles upon which they are based.

-s-

Neal O. Abreu

Assistant District Counsel

.(20)62 *(9-4-90)*
Disclosure of Tax Information Pursuant to IRC 6103(1)(4)(A)

(1) IRC 6103(1)(4)(A) authorizes disclosure of **relevant and material** returns and return information, upon written request, to an employee or former employee or their authorized legal representative for use in a personnel action or proceeding.

(5) When dealing with returns or return information in proposing disciplinary suspensions or adverse actions, the following practical steps should be followed by Personnel/Human Resources and verified by Disclosure:

(a) Prepare the proposal letter with all return information coded.

(b) Attach a key tot he coded information and include a strong admonition against disclosure of returns or return information in the body of the proposal letter.

(c) The evidence file should be coded to correspond to the key attached to the proposal letter.

(d) If the employee or his/her duly authorized representative executes a request for disclosure under 6103(1)(4)(A), and the written request is approved, the employee's representative may be provided the returns or return information.

(e) **If the disciplinary action is appealed to** arbitration, to the Equal Employment Opportunity Commi-ssion (EEOC), or to **the Merit Systems Protection Board, the appeal** or grievance **file must be transmitted to** the arbitrator, the EEOC, or **the MSPB *without* returns or return information.**

(14)15 (2-16-79) 1272

Spirit of the Act

A major aspect of the Act is the impetus it provides for recognizing the individual's right of privacy. Internal Revenue Service employees should flow the legal requirements of the Privacy Act whenever they are applicable and should make every effort consistent with law, regulations and good administrative practice, to promote the spirit of the Privacy Act by performing their duties in a manner which would recognize and enhance individual rights of privacy.

(14)16 (1/27/87) 1272

Responsibility

(1) Every employee of the Internal Revenue Service is responsible for being familiar with the provisions of the Privacy Act, commensurate with the level of his or her assigned duties, and for conforming to the requirements of the law as it applies to his or her activities.

(2) All Service officials are responsible for administering the Privacy Act insofar as provisions of the Act are applicable to their functional areas and as provided by applicable regulations, published notices, and Internal Revenue Manual instructions. [emphasis added.]

(5) Overall coordination of Service efforts to administer the Privacy Act, publication of required notices, preparation of general Internal Revenue Manual instructions, and administration of the access, amendment, and disclosure provisions of the Act are the responsibility of the Director, Office of Disclosure.

(14)17
Division of Responsibility.

(1) The Internal Revenue Service complies with the Privacy Act by integrating the Act's provisions with the Services' exising procedural instructions, such as the Internal Revenue Manual

1.4 ***(08/19/98)***
Safeguarding and Disposing of Tax Returns, Return Information and Other Confidential Records

(1) In administering Federal tax laws, the Service is furnished, collects, and maintains vast amounts of information protected by law. **The Internal Revenue Codes prohibits unauthorized disclosure of tax returns and return information.** The United States Code (Criminal), Title 18, Section 1905 (18 USC 1905), prohibits unauthorized disclosure of certain types of confidential financial and commercial information. **The Privacy Act, 5 USC 552a, prohibits unauthorized disclosure of information from systems of records pertaining to individuals.** Each of these statutes provides criminal and/or civil sanctions for unauthorized disclosure of protected information.

(2) **All Service officials and employees must be aware of what information must be protected, how it is protected,** and how it is disposed of or destroyed when it is no longer required. Proper destruction of protected records is an especially important step in preventing unauthorized disclosures that could occur when protected records are merely discarded.

1.5 ***(08/19/98)*** **Unauthorized Disclosures of Returns or Return Information**

(1) **An unauthorized disclosure is made willfully when it is done voluntarily and intentionally with full knowledge that it is wrong.**

1.5.2 ***(08/19/98)*** **Civil Liability Under IRC 7431**

(2) IRC 7431, effective for disclosures made after September 3, 1982, provides that where a Federal officer or employee knowingly or negligently discloses a return or return information in violation of the disclosure restrictions, the wronged party may bring a civil action for damages against the United States.

(3) **Non-Federal employees may be sued** for damages under IRC 7431, if they have violated the disclosure statutes.

(5) Any IRS official or employee who receives a complaint or summons in a civil suit containing allegations of unauthorized disclosure should immediately notify his/her supervisor and Regional Counsel. Headquarters officials and employees should contact the Assistant Chief

Chapter 19

Privacy Act Accounting for Disclosures

19.1 *(08/19/98)* Purpose

(1) The requirement for Privacy Act accounting for disclosure of tax records has been codified under IRC 6103(p)(3). See Chapter 38 of this Handbook.

19.2 *(08/19/98)* Accounting Requirements

(1) The Privacy Act requires each agency to keep an accurate accounting of the date, nature, **and purpose of each disclosure** of an individual's record to any person or to another agency and the name and address of the person or agency to whom the disclosure is made. See 5 USC 552a(c).

(2) The accounting is not required when the disclosure has been to those officers and employees of the agency which maintains the records who **have a need for the record in the performance of their duties.**

(3) Accounting are only required to be made when the disclosure is pursuant to subsection (b) of the Act.

P-4-6 (Approved 3-16-59)
Examiner may not examine return if relationship impairs impartiality

Examiners will not examine or survey the returns of taxpayers with whom they have had a business or social relationship of a nature that might impair their impartiality and independence.

P-4-7 (Approved 12-23-60)
Impartial determination of tax liability

An exaction by the United States Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the United States Constitution. Accordingly, Service representative in his/her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his/her duty to determine the correct amount of the tax, with strict impartiality between the taxpayer and the Government and with favoritism or discrimination as between taxpayers.

12(12)3 (05-25-95)
Employee State and Local Tax Cases (Originating Office: M)

(1) As states or cities bring to management's attention tax delinquencies of Service employees, prompt appropriate administrative action should be taken as warranted.

(2) Additionally, as Inspection in the normal course of its investigative function detects deficiencies, the report of findings will be forwarded to the appropriate managerial official for adjudication.

(3) Management officials are not required nor expected to seek out state or local tax delinquencies of Service employees.

Rule 214.3 **Reporting Allegations or Information of Employee Misconduct**

All employees must promptly report, directly to Inspection, any information or allegation coming to their attention which indicates that another employee may have committed a crime, **including violation of any tax law.** Employees must also promptly report other acts of employee misconduct such as tardiness, and misuse of leave to their immediate supervisor. Reports of misconduct involving an Inspection employee will be made directly to the Director, Internal Security Division, or the Assistant Commissioner (Inspection).

IRM **214.32 General Reporting Requirement**

(1) Except as specifically provided for in 214.33 below, **all reports of employee misconduct must be made promptly and directly to Inspection.** For the purposes of this sub-subsection, a report is considered to have been made to Inspection if submitted to the Assistant Commissioner (Inspection), to the Director, Internal Security Division, or to the Regional Inspector or any other Criminal Investigator assigned to the Internal Security function in the National, regional, or field office, as appropriate..

BRUCE E. GARDNER
P.O. Box 6183
Washington, D.C.20044-6183
(202) 271-0552

EXCERPT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER, 1000 6TH Street S.W. Washington, D.C. 20024, Plaintiff. v.. UNITED STATES OF AMERICA Washington, D.C. ...	} Civil Action No. } 1:96CV01467 (EGS) } Sullivan, J. } } VIOLATIONS OF: } 1st, 4th, 5th } Amendments USCA }
THE DEPT OF TREASURY 15TH & Penn Ave NW Washington, D.C. INTERNAL REVENUE SERVICE 1111 Constitution Ave NW Washington, D.C. 20024 State of California P.O. Box 944255 Sacramento, CA 94244-2550 Merit Systems Protection Board 1120 Vermont Ave. Ste 806 Washington, D.C. 20419	)DEFAMATION ACTION)CALIFORNIA CIVIL CODE)(§44, §45, §45a, §46)))LIBEL-TEXAS CIVIL STATUTE) (§ 73.001 et.seq)))PRIVACY RIGHT ACT)VIOLATIONS)(5 USC §552a(b)))(5 USC §552a(e)(1)) }(5 USC §552a(e)(2)) }(5 USC §552a(e)(7)) }(5 USC §552a(e)(10)) } DEMAND FOR JURY

Franchise Tax Board	)
9645 Butterfield Way	) Whistleblower's
Sacramento, CA 95827	) Protection Act
&	} 5 U.S.C §. 2302(b)(8)
IN THEIR INDIVIDUAL CAPACITIES	}
	)Family Leave Act of
NEAL O. ABEU	)1994
9185 Black Forest Lane	)
Fair Oaks, California 95628	)
	)California Disclosure
STEVEN J. MOPSICK	)Of Information Act
ROBERT J. WILSON	)§19542 et. Seq.
ALBERT LARSON, III	)
BENJAMIN C. SANCHEZ,	)California Information
DENNIS A. QUINN,	)Rights Act Practice
FRANK STOKES,	)Act §1798.24 et.seq
WILLIAM REITAN,	)
HELEN F. JAMISON	)
STACIA GREAUX	)DEMAND FOR JURY TRIAL
Ben L. Erdreich	}
Antonio C. Amador	}

PLAINTIFF'S AMENDED[1] COMPLAINT FOR VIOLATIONS OF THE LAWS OF THE UNITED STATES, STATE OF CALIFORNIA AND THE STATE OF TEXAS.

12. The suite arises under the 1st, 4th, and 5th Amendments of the United States Constitution for abridgement of freedom of expression, violation of reasonable expectation of privacy, illegal search and seizure, and taking of property and liberty without due process of law.

---

[1] Complaint amended prior to service on any defendant .

13. This suit arises under the laws of the Internal Revenue Code for the unauthorized disclosures of Plaintiff's tax returns and tax return information in violation of 26 U.S.C. § 6103(a) and 26 U.S.C. § 7431(c).

14. This suit arises under the laws of the Privacy Rights Act of 1974 pursuant to 5 U.S.C. § 552a(g)(1)C) and 5 U.S.C.§ 552a(g)(4) for wilfully or intentionally failing to maintain records concerning Plaintiff with such accuracy, relevancy, and completeness as was necessary to assure fairness in determinations relating to his qualifications, character, right, or opportunities of, or benefits to him made on the basis on such records, and which resulted in adverse determinations to him based on those records.

15. This suit arises under the laws of the Privacy Rights Act of 1974 pursuant to 5 U.S.C. §552a(g)1)(D) and 5 USC§552a(g)(4) for wilfully or intentionally failing to comply with any other provisions of 5 U.S.C. § 552a, in such a way as to have an adverse affect on Plaintiff. ...

COUNT I

19. Incoporate pargraphs 1-18 and Count XXXXIV in this Count by reference.

20. During the period January 1, 1991 through December 31, 1994, the IRS Office of the Chief Counsel (CHIEF COUNSEL) had a Regional Office in San Francisco, California (REGIONAL OFFICE) and a District Office in Sacramento, California (SACRAMENTO OFFICE).

21. Plaintiff, Bruce E. Gardner was employed as a General Attorney (Tax) with SACRAMENTO OFFICE during the period January 6, 1991 through November 24, 1994.

22. IRS Assistant District Counsel, Neal O. Abreu (ABREU), was Mr. Gardner's supervisor for almost the entire period he was employed in the Sacramento Office.

23. Defendant ABREU's official duties involed the supervision of Mr. Gardner and other attorneys assinged to his group.

24. 26 U.S.C. §§ 6011, 6011, 6012(a) (Internal Revenue Code) and their regulations required Mr. Gardner and all other Department of Treasury emplyees, IRS employees and taxpayers to file their tax returns when due.

25. The Internal Revenue Code also provides for criminal prosectuion for failure to file a tax return or pay taxes. 26 U.S.C. §7203.

26. Failure to file a federal tax return may be grounds for dismissal from any position held within the TREASURY or IRS.

27. On or about April 15, 1994, Plaintiff and his spouse jointly filed Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, with the IRS in Odgen, Utah for the 1993 tax year.

28. The Ogden Service Center is a custodian of the records (OGDEN CUSTODIAN) and the place where Mr. Gardner would file his 1993 federal tax return.

29. The joint 1993 Form 4868 was accepted by the OGDEN CUSTODIAN of records granting Plaintiff and his spouse until August 15, 1995 to file their joint 1993 Form 1040.

30. On or about August 15, 1994, pursuant to 26 U.S.C.§§ 6001, 6011, and 6012(a), Plaintiff and his spouse filed their joint 1993 Form 1040 with the OGDEN CUSTODIAN of records.

31. In September of 1994 Defendant ABREU recommended that Mr. Gardner be terminated from his attorney position with the SACRAMENTO OFFICE.

32. On or about November 15, 1994, defendant SANCHEZ approved defendant ABREU's recommendation and Mr. Gardner was removed from his position.

33. On or about June 1995, Defendant ABREU was called as witness to testify against Mr. Gardner in a State of California Unemployment Insurance Appeal Board (CUIAB) hearing.

34. Defendant ABREU's sworn statement was tape recorded and subsequently memorialized in the form of a written transcript of the CUIAB.

35. During said appeal hearing Defendant ABREU, was asked by Plaintiff's attorney did he tell Mr. Gardner to provide him a copy of his 1993 tax return when it was filed.

36. Defendant ABREU testified that he did, and voluntarily disclosed that he made an inquiry to an unidentified IRS employee about reviewing Mr. Gardner's tax return records to determine when he filed his 1993 tax return.

37. Defendant ABREU voluntarily disclosed at the hearing that the unidentified IRS Sacramento employee entered the system of records maintained by the IRS and disclosed to his that Mr.Gardner did not filed fhis 1993 tax return.

38 Defendant ABREU voluntarily disclosed in the tape recorded hearing that Mr. Gardner had not filed his 1993 federal tax return during the period January 1994 through the middle of October, 1994.

39. Defendant ABREU'S wilful salnderious disclosure of Plaintiff's 1993 tax return information was done in the presence of IRS Sacramento District Counsel, Steven J. Mopsick (MOPSICK), IRS General Litigation Services (GLS) attorney, Robert J. Wilson, Mr. Gardner's attorney, Joseph L. Russell, and Administrative Law Judge Sharrel J. Wyatt (WYATT)..

40. Defednatn ABREU's intentional and wanton disclosure that Mr. Gardner violated the civil and criminal tax laws of the United States were false wilful and made in total disregard of the truth.

41. Defendant ABREU's malicious disclosure concerning Mr. Gardner's 1993 tax return was with the specific intent to prejudice Mr. Gardner's employment hearing and to have WYATT deny Mr. Gardner and his family unemployment benefits.

42. Defendant ABREU's willful statement resulted in Mr. Gardner being denied unemployment benefits and having to repay over $15,000 of the benefits his family previously received to the State of California plus attorney fees.

43. ABREU casued Mr. Gardner's timely filed 1993 federal return to be audited by the IRS.

44. Defendant ABREU'S wanton disclosures were republished in the written transcript of the hearing which was subsequently reproduced, distributed, and disclosed to countless persons.

45. Defendant ABREU's malicious oral disclosures violated Cal. Civ. Code §46.

46. The republication of ABREU's fa;se amd wilful statements are also libelous on their face, with one vilation for each instance of republication pursuant Cal.Civ.Code §45a/

47. Plaintiff sustained special damages as a proximate cause of ABREU's CUIAB slanderous statemetns.

48. Plaintiff sustained special damages as a proximate cuase of ABREU's CUIAB libelous statements.

49. ABREU is liable to Mr. Gardner and his family for the special damages incurred and must pay punitive damages int eh minimu amount of $80,000 for his wilful defamatory statements.

50. ABREU must be held liable for compensatory damages for the defamatory sworn statements he made before WYAT which were subsequently transcribed and redistributed in the CUIAB cas.

51. ABREU must be held liable for compensatory damages for causing Mr. Gardner's 1993 federal tax return to be audited, adversley affecting his 1993 federal tax refund claim, and for willfully contributing to the denial of Mr. Gardner's 5th Amendment rights to due process of law.

COUNT IV.A

(MSPB wilfully violated the privacy right act)

100a. Incorporate paragraphs 1 through 100 in this Count by reference.

100b. MSPB maintains and controls a system of records.

100c. Mr. Gardner's records are contained in the MSPB's system of records which are retrievable by an identifier such as a docket number.

100d. The system of records maintained by the MSPB contain false, defamatory, and inaccurate records about Mr. Gardner including the defamatory records made by ERDREICH, AMADOR, and the MSPB that were wilfully placed in their system of records.

100e. MSPB's system of records contain information on how Mr. Gardner exercised his 1st amendment right to freedom of expression which were wilfully or wantonly maintained by the MSPB.

100f. Mr. Gardner did not consent to the wilful inclusion, maintenance, or disclosures of the false, defamatory, or inaccurate records in the MSPB' system of records.

100g. MSPB's creation, retrieval, extraction, or disclosure of the false records of Mr. Gardner it wilfully and

intentional maintained and released adversely affected Mr. Gardner's property rights.

100h. MSPB' false, defamatory, and inaccurate records that adversely affected Mr. Gardner's federal state property rights were the proximate cause of his injuries.

100i. MSPB wilfully or intentionally violated the privacy right act based on the records contained in its system of records of Mr. Gardner. 5 U.S.C.§ 552a(e)(5),(7).

100j. MSPB is labile for damages for each violation of the ACT and all multiple violations in the minimum amount of $1,000 each.5 USC§ 552a(g(1)(C) &(D); §552a(g)(4).

100k. MSPB must be ordered to remove all false, defamatory, and inaccurate records of Mr. Gardner from their system of records including his 1990 tax returns, 1990 tax return information, and all other tax returns or return information to prevent further unauthorized disclosures of his personal tax records. 5 U.S.C.§ 552a(g)(1),(2)(A), §552a(e)(1), 552a(g)(1)(D).

Count V

(UNITED STATES wilfully violated the disclosure laws concerning 1993 tax return information 26 U.S.C. §6103(a) and 26 U.S.C.§7431(a)

101. Incorporate pargraphs 1-100l in this Count by reference.

102. ABREU's false disclosure that Mr. Gardner had not filed his 1993 federal tax return was a disclosure of Mr. Gardner's 1993 tax return information as defined in 26 U.S.C. 6103(b).

103. *Mr. Gardner did not authorize the disclosure* of any of his 1993 tax return information and these disclosures were unauthorized pursuant to 26 U.S.C. 6103(a).

104. ABREU's unauthorized disclosures of Mr. Gardner 1993 tax return information were *willful, intentional, or consititued grossly neglient disclosures.*

105. ABREU's unauthorized disclsoures of Mr. Gardner's 1993 tax return information were done in *bad faith.*

106. ABREU had previously been put on notice prior to the unauthorized disclosures made by him and other TREASURY officials that Mr. Gardner did not want his federal tax return or tax return information disclosed to them.

107. Mr. Gardner is entitled to punitive damages in the amount of $200,000 from the UNITED STATES for ABREU's unauthorized disclosures pursuant to 26 U.S.C.§7431(c).

108. 26 U.S.C. §7431(c) entitles Mr. Gardner to actual damages of $100,000 for his injuries from the UNITED STATES.

109. 26 U.S.C.§7431 provides for minimum damages of $1,000 for each unauthorized disclosure to each individual. The facts disclose a minimum of 14 spearate individuaal heard or read the unauthorized tax disclosure. The ramification of the unauthorized disclosure could increase exponentially.

COUNT XXXVI

(ABREU, WILSON, MOPSICK violated Mr. Gardner's 4th amendment right of an expection of privacy and agianst unwarranted searches and seizures-WAGES)

439. Incorporate paragraphs 1-438 herein by reference.

440. In or before June of 1994, ABREU, MOPSICK, or WILSON contracted the IRS DATA CENTER regarding Plaintiff.

441. ABREU, MOPSICK, or WILSON wilfully or wantonly provided the IRS DATA CENTER with Mr.

Gardner's social security number which they wilfully or intentionally seized from a search of TREASURY's system of records. 5 USC§552a(e)(2),(9),(10), §552a(b).

442. ABREU, MOPSICK, or WILSON wilfully or wantonly gave the unknown official at the IRS DATA CENTER Mr. Gardner's social security number to input into the DATA CENTER's system of records for a match. 5 usc552a(b).

443. The unknown IRS DATA CENTER official wilfully searched the IRS' system of employment records, retrieved a record, and seized a copy of Mr. Gardner's payroll records from that system which relfected his name, social security number, wages earned, taxes withheld, social security taxes paid for the tax years 1988 through 1992 (WAGES RECORDS). 26 USC§6103(b)(2); 5 USC§552a)b_. 5 USC§552a(e)(9),(10).

444. The unknown IRS DATA CENTER official wilfully or wantonly seized a transcript from the sytem of records seaarched, printed a hard copy and disclosed it to ABREU, MOPSICK, or WILSON. 26 USC§6103(a), §7431(c), 5 US§C552a(b), §552a(e)(9),(10).

445. Mr. Gardner's WAGE RECORDS wilfully or wantonly were placed in the TREASURY's system of records and disclosed to the SACRAMENTO OFFICE and placed in their system or records.

446. In or about July of 1994, ABREU and MOPSICK reviewed the IRS WAGE RECORDS of Mr. Gardner's and questions plaintiff about various information contained on those records.

448. ABREU, MOPSICK, or WILSON willfully or intentionally violated Mr. Gardner's 4th amendment rights against arbitrary searches and seizures by obtaining his IRS WAGE RECORDS.

449. Mr. Gardner's federal and state property rights were adversely affected without due process of law as a consequence of ABREU, MOPSICK, and WILSON's wilfully or wantonly violations of his constitutional rights.

450. ABREU, MOPSICK, and WILSON must be held jointly liabile for punitive damages in the minimum amount of $250,000 for their wilful or wanton violations of Mr. Gardner's U.S. Constitutional rights.

450a. Alternatively, UNITED STATES is lable for all U.S. Constitutional and federal law violations of its agents.

COUNT XXXVII

(IRS liable for privacy righ violations-WAGES)

451 Incorporate paragraphs 1-450a in this Count by reference.

452. Plaintiff neither consented nor was notified of the search, retrival, or dislcoures of his IRS WAG RECORDS.

453. IRS intentionally or wilfully violated the privacy rights act and is liable for damages that adversely affected Mr. Gardner's federal and state property rights in the minimum amount of $1000 for each violation and one for each unauthorized disclsoure or subsequent unauthorized disclosure.

September 19, 1996

-s-

Bruce E. Gardner
P.O. Box 6183
Washington, D.C.
20044